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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 October of this year. These decisions will appear in the September/October 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 – Timeliness – In March 2016, the Carpenters signed a voluntary recognition agreement with the Respondent as the bargaining agent for certain employees of PCR Constructors Inc. – Respondent sent the Carpenters a notice to bargain and requested that the Minister of Labour (the "Minister") appoint a Conciliation Officer – Conciliation Officer appointed in May 2016 – Carpenters took no action until January 2020, when it requested the Conciliation Officer schedule a meeting – In April 2020, the Applicant filed a displacement application for certification under section 8 of the *Labour Relations Act*, *1995* (the "*LRA*") – At the time of the application, the meeting with the Conciliation Officer had not taken place, the Conciliation Officer had issued no report, and the parties had not reached a collective agreement – Carpenters argued application was untimely because the requirement of section 67(1) was not met: the Conciliation Officer had not reported to the Minister and no "no board report" had been issued – Board held it has discretion to hold an application under section 67(1) of *LRA* is timely even if no conciliation report has been made – Literal reading of section 67(1) would mean a timely displacement or termination application could not be filed until after a Conciliation Officer had reported back to the Minister or the Minister had released a "no board" report – This could result in employees being trapped in a collective bargaining relationship they no longer wanted – While the *LRA* does not explicitly mandate a point at which conciliation must come to an end, it does not contemplate or permit conciliation to act as a bar to an application for an extended or indefinite period of time – Parties may extend the conciliation process provided doing so is "reasonable" – "Reasonable" implies the parties are diligently working towards a collective agreement and that the process shows progress as well as potential for the completion of a collective agreement in the near future – In this case, the parties did nothing between May 2016 when the Minister appointed a Conciliation Officer and January 2020 when the Carpenters requested a meeting with the Conciliation Officer – Application was filed well outside period recognized by Board's jurisprudence as the outer limit for timeliness bar – Matter continues.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: PCR CONSTRUCTORS INC.; OLRB Case No.: 0183-20-R; Dated: October 14, 2020; Panel: Jack J. Slaughter (24 pages)

Construction Industry – Application for Certification – Broker Drivers – Status Disputes - True Employer – Respondent was a "commercial vehicle operator" and held a Commercial Vehicle Operator Registration – It owned and operated its own fleet of trucks – Applicant applied for certification of a bargaining unit consisting of all teamsters engaged in on-site construction in the ICI sector and in the non-ICI sectors in Board Area No. 8 – On the date of the application, the Respondent had requested another commercial vehicle operator, SIA Transport Inc. (SIA), dispatch additional trucks and drivers (the "Brokered Trucks" and "Brokered Drivers") – Job included attending at the construction site, loading the truck with excavated materials, and driving to the dump site – Brokered Trucks had been leased by SIA, and Brokered Drivers received their pay and assignments from SIA – Respondent argued it was the true employer of the Brokered Drivers, because it effectively hired them once it asked SIA for additional trucks – Respondent argued the Board should focus on what goes on at the construction site and that the site foreman or other employees of the Respondent provided the onsite instructions to the Brokered Drivers – Board held SIA was the true employer of the Brokered Drivers – In order to determine the true employer, the Board will focus on substantive reality, as opposed to form, in order to identify the party that has the most control over the employment relationship – Respondent had no involvement in the hiring, training, orientation, assignment, discipline, evaluation, or compensation of the Brokered Drivers – Respondent's role was limited to informing SIA how many trucks were required – On the application day, Respondent's direction and control of the Brokered Drivers was minimal, as it had no direction and control over the work being performed at the dump site or over the driving duties performed by the Brokered Drivers – Recognition of the Respondent as the true employer of the Brokered Drivers would not promote effective and stable labour relations, as it would result in inclusion of employees of an arms-length entrepreneurial subcontractor in a bargaining unit with full-time fleet drivers of the Respondent – Matter continues.

TEAMSTERS LOCAL UNION NO. 230, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; RE: LAKESIDE CONTRACTING COMPANY LIMITED; OLRB Case No: 1222-18-R; Dated October 20, 2020; Panel: John D. Lewis, (33 pages)

***Employment Standards Act* – Appeal of Director's Order to Pay – Director's Liability –** Employment Standards Officer issued four orders to pay against the company of which the Applicant was a director – Amounts remained outstanding – Director of Employment Standards issued an order to pay against the Applicant – Applicant argued she was not responsible for specific operation and management of the company – Applicant argued the person responsible for the management of the company had resigned without notifying anyone - Board held the Applicant liable – Section 262(3) of the *Business Corporations Act* creates a rebuttable presumption that a person named as a director in the most recent corporate return or notice is a director of that corporation – There was no dispute the Applicant was a director at relevant times – Under sections 81(1)(b) and (c) of the *Employment Standards Act* (the "*ESA*"), directors of a corporate employer are jointly and severally liable for wages owed to unpaid employees – *ESA* does not recognize a distinction between active and inactive directors – A director is liable even if she only had a passing involvement in the corporation and was a director "in name only". Appeal dismissed.

RE: TONG GAO A.K.A TAMMY GAO A DIRECTOR OF CANADA BLOCKCHAIN E-COMMERCE LTD.; RE: QIONG FU; RE: WEIXIA OU; RE: MINGYU ZHANG; RE: PAUL KEARNS; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No: 3282-19-ES; Dated: October 9, 2020; Panel: Derek L. Rogers (4 pages)

***Occupational Health and Safety Act* – Appeal of Inspector's Order – Jurisdiction –** Unions sought to engage the Ministry of Education ("MOE") regarding minimum provincial workplace standards to protect from the transmission of COVID-19 upon school reopening – MOE did not

agree to Unions' proposals – MOE subsequently issued the *Guide to Re-opening Schools* (the "Guide") – Unions asserted the Guide did not take every precaution reasonable in the circumstances to protect teachers and education workers as required by section 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1, as amended ("*OHSA*") – Unions met with the Minister of Labour (the "Minister") to discuss concerns – Unions requested the Minister appoint an inspector under *OHSA*, asked the Minister to issue province-wide orders to apply to all schools everywhere in Ontario, directing minimum standards to be inserted into the Guide – Minister declined to do so – Unions filed a number of appeals – Board held it lacked jurisdiction under Section 61 of *OHSA* – As a statutory body, Board only has jurisdiction specifically granted to it by statute – Board's jurisdiction under *OHSA* is limited to three circumstances: a reprisal complaint under Section 50, an application under Section 46 by a certified member of a joint health safety committee at a workplace or an inspector who has reason to believe that the procedure for stopping work in Section 45 will not be sufficient to protect workers at the workplace from serious risk to their health and safety, and an appeal under Section 61 from an order of an Inspector (which includes a refusal to issue an order) – Board is an expert body and *OHSA* is a public welfare legislation subject to a broad and purposive interpretation, but this broad approach is not limitless - Statutory interpretation must be faithful to the purpose and scope of *OHSA*, and must not lead to absurd results - Minister is not an Inspector under *OHSA* – *OHSA* is a highly defined statute, and both the Minister and an Inspector have defined roles under *OHSA* – *OHSA* does not give the Minister and an Inspector over-lapping duties – Even if the Minister was an inspector, he did not issue an order, nor did he decline to do so – *OHSA* requires an inspector to "find" a contravention of *OHSA* or its regulations in a final decision and after an investigation – No such investigation took place in this case – An inspector has no authority to issue the provincial minimum standards – While in an appeal under section 61(4) of *OHSA* the Board has all the powers of an Inspector, the regime of *OHSA* was established and is intended to deal with specific circumstances in specific workplaces and cannot be used to create provincial standards across Ontario – *OHSA* does not empower the Board to generally police the action or inaction of the Minister – Unions are not deprived of remedy – Under *OHSA*, an inspection would be triggered if an employee exercised his/her right to refuse unsafe work, or if a member of the joint health and safety committee disputed whether dangerous circumstances exist in a workplace. Appeals dismissed.

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF EDUCATION; RE: ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; RE: ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; L'ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS FRANCO-ONTARIENS; RE: THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF LABOUR; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; RE: CANADIAN UNION OF PUBLIC EMPLOYEES; RE: COUNCIL OF TRUSTEES' ASSOCIATIONS; OLRB Case No: 1228-20-HS, 1236-20-HS, 1239-20-HS, 1240-20-HS; Dated: October 1, 2020; Panel: Bernard Fishbein (42 pages)

Practice and Procedure – Evidence – Labour Relations Privilege – In a termination grievance proceeding, Union sought disclosure of a number of emails sent from the Employer's Associate Director of Labor Relations (the "Sender") to the Employer's General Manager and Service Supervisor (the "Recipients") – Each email included an attached draft letter with instructions to the Recipients on how to deliver them when finalized – Board held the emails were subject to labour relations privilege – The four Wigmore criteria were met – Emails originated in a confidence that they would not be disclosed to the Union – Preservation of this confidence was essential to the full and satisfactory maintenance of the relationship between the Sender on the one hand and the Recipients on the other – Recipients were

entitled to reach out to and seek advice from the Sender when considering taking disciplinary action against an employee, without any concern that the Sender's recommendations would be subject to production in the event an arbitration were to result – Relationship between the Sender and the Recipients was one which the labour relations community ought to sedulously foster – There is labour relations privilege over communications between a manager of an employer and his or her labour relations advisor – Harm resulting from disclosure of the emails would outweigh the benefit gained for the purpose of properly adjudicating this grievance – Disclosure of the emails would have a chilling effect upon the Respondent's managers and senior labour relations advisors. Matter continues.

OTIS CANADA INC.; RE: INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; OLRB Case No: 0188-20-G; Dated: October 5, 2020; Panel: Lee Shouldice (7 pages)

Settlement – Abuse of process – *Occupational Health and Safety Act* – Harassment – Duty to Investigate – Appeal of Inspector's Order – Complainant received a settlement package on termination of employment, including severance payment in excess of her entitlements under the *Employment Standards Act* or at common law – Complainant signed a broadly-worded release – Complainant subsequently filed a complaint with the Ministry of Labour ("MOL"), alleging she was harassed by a manager for seven years while she worked for the Employer – Employer had no record of a harassment complaint by the Complainant – At the time of the complaint, the manager who allegedly harassed the Complainant was still employed by the Employer – An Inspector investigated the complaint – Inspector issued an order under the *Occupational Health and Safety Act* R.S.O. 1990, c.O.1, as amended ("*OHSA*") requiring the Employer to ensure that an investigation was conducted into incidents and complaints of harassment – Employer argued the complaint to the MOL, and therefore the order, were both caught by the release - Board held the release was not a bar to MOL issuing the order - *OHSA* is a public welfare legislation about health and safety at the workplace – MOL has a statutory duty to issue an order if an inspector finds a contravention of *OHSA* – Triggering event (allegation of workplace harassment by a manager who was still employed) was not personal to the Complainant, but related to a potential long-term, ongoing, and unchecked workplace hazard to all the other employees who work with the alleged hazard – Settlement was between the Complainant and the Employer – MOL was not a party to the contract and is not bound by it – Order under appeal does not originate from the Complainant, but from MOL – Employer's remedy for the Complainant's putative breach of the release is not with the Board and against MOL, but rather pursuant to the terms of the release itself - The fact the Complainant was not an employee at the time of the complaint does not operate as a bar to the Complainant filing her complaint, nor does it provide a basis for rescinding the order that was issued as a result of that complaint – Alleged harasser continues to work for the Employer, and represents a potential workplace hazard – An investigation may help ensure the health and safety of the remaining employees in the workplace – Board held the order was not too vague, as the Employer was aware of the identities of the Complainant and of her alleged harasser – Absence of further details may impact what kind of investigation is appropriate in the circumstances, but not whether investigation is required at all – Employer cannot rely on the release to satisfy its statutory obligation to investigate the allegations of harassment. Appeal dismissed.

E.S. FOX LIMITED; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB Case No: 3484-19-HS; Dated: October 5, 2020; Panel: Adam Beatty (20 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
SNC Lavalin Nuclear Inc. Divisional Court No. 473/20	3488-19-ES	Pending
KD Poultry Divisional Court No. 20-DC-2611 **(Ottawa)**	0618-19-ES 1683-19-ES 1684-19-ES 2165-19-ES	Pending
Paul Gemme Divisional Court No. 332/20	3337-19-U	Pending
Fortis Construction Group Inc. Divisional Court No. 395/20	1638-17-R	Pending
Aluma Systems Inc. Divisional Court No. 456/20	2739-18-JD	Pending
Anthony Hicks Federal		
Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-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	November 18, 2020
New Horizon Court of Appeal No. C68664	0193-18-U	Pending
Doug Hawkes Divisional Court No. 249/19	3058-16-ES	Pending

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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
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Adjourned due to pandemic
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