ISSN 1712–4506 (Online)

# *Ontario Labour Relations Board* HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

June 2017

## NOTICES TO COMMUNITY

### Board Geographic Areas

The Board has produced a new geographic area map to reflect the elimination of "white areas." The map consists of three pages: Southern Ontario, Northern Ontario, and a listing of the revised Board Areas. The map takes effect July 4, 2017 and will be available on our website. Earlier (January 1982 and June 2016) maps will remain on the website.

### Ontario College of Trades

Effective June 6, 2017, the Board has jurisdiction to entertain applications for review of Notices of Contravention issued pursuant to the *Ontario College of Trades and Apprenticeship Act, 2009*. Forms A–134 (application) and A–135 (response) and Information Bulletin No. 36 relate to this new authority. These are available on the Board's website.

## SCOPE NOTES

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

---

**Health and Safety** – The applicant brought a s. 50 reprisal complaint – The Board asked the parties why it should not defer to other proceedings – The applicant refused modified work when it appeared to aggravate an injury for which he had already received WSIB benefits – His matter was already remitted to the WSIB for re-assessment, and his union had filed a grievance for the employer's failure to accommodate the applicant in suitable employment – The Board held that although the facts of this matter appeared to meet both elements of a reprisal (exercising rights under the OHSA and suffering an employment consequence, i.e., being sent home) the other on-going proceedings might appropriately and conclusively resolve the dispute – Board application adjourned *sine die*

**GATE GOURMET A GATE GROUP MEMBER;** RE: MIGUEL VILLEDA; OLRB File No. 3124–16–UR; Dated May 19, 2017; Panel: Mary Anne McKellar (10 pages)

---

**Certification – Construction Industry – Practice and Procedure – Termination – Voluntary Recognition** – LIUNA brought an application to certify employees of Looby and a s. 66 application challenging the voluntary recognition agreement entered into for the subject employees between CLAC and Looby – CLAC argued that the Board should examine the circumstances of the VRA in much the same way as it would an application for certification: by comparing CLAC's membership evidence against the employer's list of employees at work on the date the VRA was entered into – The Board held that the evidentiary requirements of a certification (mandatory presentation of employee support) are different from the requirements under s. 66 (more ways to prove support) – S. 119 prevents the disclosure of membership support in both circumstances – The Board rejected CLAC's

proposed marshalling of membership evidence but refused to define how CLAC and Looby might defend the s. 66 challenge – Matter continues

**LOOBY CONSTRUCTION LIMITED;** RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 0027–17–R & 0255–12–R; Dated May 23, 2017; Panel: David A. McKee (15 pages)

---

**Employee – Employment Standards** – Toucan applied under section 116 of the *Employment Standards Act, 2000* for a review of an order to pay unpaid wages – Toucan argued the Claimant was an independent contractor and had no employment relationship with it – Toucan recruits and engages individuals to receive telephone meal orders for its clients – The Claimant initially contacted Toucan after seeing a Kijiji ad for independent contractors – The Claimant's contract with Toucan identified her as an independent contractor, set out the commission rate, required her to reimburse Toucan for errors in the orders she took, allowed her to hire subcontractors subject to Toucan's approval, enabled her to work for direct competitors, generally allowed her to choose when she worked, and it deemed any of her inventions were the property of Toucan – The Claimant paid for her own training and provided her own computer equipment – Toucan provided the Claimant with a process manual and scripts to read to customers – The Board found the Claimant was an employee of Toucan and not in business on her account – The tools provided by the Claimant, *i.e.* her computer and internet, are commonly found in many households – There was no significant financial outlay for the equipment nor was it specialized – The only specialized equipment was the order taking software Toucan and its client provided – The Claimant was unable to negotiate her commission rate and, given the low rate, there was no realistic prospect she could sub-contract the work – Toucan also exercised control over the Claimant: it managed her performance, provided feedback, identified failures, provided a process manual, and conversation scripts – The Board also found deducting money from her commission for errors in her order taking violated section 13(5) of the *Act* which precludes deductions for faulty work – Application allowed in part – The Board ultimately reduced the order to pay to reflect the Claimant's actual hours of work.

**MARGARET ANN KEAST AND KAREN H. MCNEIL O/A TOUCAN COMMUNICATIONS;** RE: ANGE IRAFASHA; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 2360–16–ES; Dated May 12, 2017; Panel: Mary Anne McKellar (13 pages)

---

## COURT PROCEEDINGS

**Judicial Review – Reconsideration – Timeliness** – Applicants sought judicial review of the Board's May 11, 2016 decision finding they were bound to a province-wide collective agreement – The Board's decision was in response to a Ministerial Reference – Unfortunately, the Confirmation of Filing issued to the parties was faulty and did not accurately reflect the Minister's question, *i.e.* it contained two questions that were different than the Minister's question – A copy of the Minister's question was not attached to the Confirmation – The Divisional Court found the application was premature and suggested the Applicants ask the Board to reconsider its decision under section 114 of the *Labour Relations Act, 1995* – The Divisional Court held it is well established a party must exhaust all available remedies before bringing an application for judicial review absent exceptional circumstances – The Applicants did not demonstrate there were exceptional circumstances – Application dismissed

**S. & T. ELECTRICAL CONTRACTORS LIMITED AND S & T INDUSTRIAL INC. V IRON WORKERS DISTRICT COUNCIL OF ONTARIO AND INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786 AND ONTARIO LABOUR RELATIONS BOARD**; 2017 ONSC 2926 (Court File No. 406/16); Dated May 11, 2017; Panel: Nordheimer J., Spies J., Matheson J. (3 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 |
|---|---|---|
| **Across Canada**<br>Divisional Court No. 244/17 | 3673–14–R | Pending |
| **LIUNA *(Pomerleau Inc.)***<br>Divisional Court No. 257/17 | 3601–12–JD | Pending |
| **TTC**<br>Divisional Court No. 262/17 | 1995–16–HS | Pending |
| **Myriam Michail**<br>Divisional Court No. 624/17 **(London)** | 3434–15–U | Pending |
| **Peter David Sinisa Sesek**<br>Divisional Court No. 93/16 | 0297–15–ES | Pending |
| **Women's College Hospital**<br>Divisional Court No. 24/17 | 0830–15–M | Pending |
| **Innovative Civil Constructors**<br>Divisional Court No. 611/16 | 0142–16–R | Pending |
| **Yuchao Ma**<br>Divisional Court No. 543/16 | 2438–15–U | Pending |
| **Ming Tang**<br>Divisional Court No. 452/16 | 3607–14–U | June 22, 2017 |
| **Anishinabek Police Service**<br>Divisional Court No. 455/16 | 0319–13–R &<br>1629–13–R | September 11, 2017 |
| **Cecil Cooray**<br>Divisional Court No. 324/16 | 1594–15–U | June 29, 2017 |
| **946900 Ontario Limited**<br>Divisional Court No. 239/16 | 3321–14–ES | Pending |
| **S & T Electrical Contractors**<br>Divisional Court No. 406/16 | 1598–14–U | Dismissed for prematurity<br>May 11, 2017 |
| **Carpenters (*Riverside*)**<br>Divisional Court No. 363/16 | 0630–16–R | September 15, 2017 |
| **Lee Byeongheon #2**<br>Divisional Court No. 16–2219 **(Ottawa)** | 0095–15–UR | June 15, 2017 |
| **Lee Byeongheon #1**<br>Divisional **Court** No. 16–2220 **(Ottawa)** | 0015–15–U | June 15, 2017 |

| | | |
|---|---|---|
| **Labourers' International Union of North America, Local 183** ***(Alliance Site Construction Ltd.)***<br>Divisional Court No. 133/16 | 3192–14–JD | October 26, 2017 |
| **R. J. Potomski**<br>Divisional Court No. 12/16 **(London)** | 1615–15–UR<br>2437–15–UR<br>2466–15–UR | Pending |
| **Serpa Automobile (2012) Corporation (o/a Serpa BMW)**<br>Divisional Court No. 095–16 | 0668–15–ES | Pending |
| **David Houle**<br>Divisional Court No. 1021–16 **(Sudbury)** | 0292–15–U | Pending |
| **Qingrong Qiu**<br>Divisional Court No. 669/15 | 2714–13–ES | Pending |
| **Kognitive Marketing Inc.**<br>Divisional **Court** No. 51/15 **(London)** | 0621–14–ES | Week of November 27, 2017 |
| **W.H.D. Acoustics Inc. (Hannam)**<br>Court of Appeal No. M47477 | 3151–14–G<br>3716–14–R | Leave to C.A. dismissed May 19, 2017 |
| **Valoggia Linguistique**<br>Divisional Court No. 15–2096 (**Ottawa)** | 3205–13–ES | Pending |