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Ontario Labour Relations Board HIGHLIGHTS

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NOTICE TO THE COMMUNITY

White areas

The Board will accept submissions in response to its proposed elimination of the "White Areas" for construction industry matters, until April 21, 2017. Please see the attached communication.

SCOPE NOTES

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

Related Employer – Sale of a Business – The union argued that when Molson Coors Canada (MCC) altered a longstanding arrangement between MCC and arm's length Sherway Warehousing so that Sherway took over various distribution responsibilities for delivery of product to The Beer Store, the Sherway operation became a functionally integrated part of MCC's business, or that the two entities became a single employer – It was conceded that prior to the shift, MCC was at liberty to utilize "outside storage locations" and in doing so MCC was not in violation of the collective agreement; also, prior to the shift, Sherway was engaged in the assembly of product (full and partial pallets), but not delivery – The Board held that the additional work Sherway took on as a result of the shift was in pith and substance the same work it had been doing for many clients and was not materially distinguishable from work it has performed for MCC – The Board further held that while MCC and Sherway were involved, to some extent, in related activities (the warehousing of MCC product), those activities do not constitute a "core" function of MCC's business (brewing) – Application dismissed

CANADIAN UNION OF BREWERY AND GENERAL WORKERS, COMPONENT 325; RE: MOLSON COORS CANADA (TORONTO BREWERY); RE: SHERWAY WAREHOUSING INC.; RE: SHERWAY LOGISTICS INC.; OLRB File No. 3008-12-R; Dated March 3, 2017, Panel: Derek L. Rogers (84 pages)

Certification – Constitutional Law – Construction Industry – LIUNA sought certification of employees engaged by Ramkey to provide services to operations of telecommunications networks – Ramkey argued it fell within federal jurisdiction even though it neither owned nor had any interest in any telecommunications networks (nor did the networks have any ownership or interest in Ramkey) – There was no dispute that the work at issue was construction work: overhead placement or underground excavation to support infrastructure (e.g., trenching, drilling, pneumatic piercing, cutting, duct proofing, power supply installation) – The Board began its analysis confirming that labour relations are presumptively a matter of provincial jurisdiction – After an extensive survey of related and applicable court case law (*Montcalm, Northern Telecom #1 and #2*) and its own recent jurisprudence, the Board held that, at best, Ramkey only "derivatively"

comes into federal jurisdiction – The network companies (Rogers, Cogeco and others) are content to contract this construction work to independent arm's length companies like Ramkey and others – Ramkey had a host of its own customers, both federal and provincial – The Board concluded that building infrastructure, be it a pipeline, railroad or telecommunications, is still construction and therefore provincial – Application granted

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: RAMKEY COMMUNICATIONS INC.; OLRB File No. 1269-15-R; Dated March 23, 2017; Panel: Bernard Fishbein (119 pages)

Employment Standards – Failure to Comply – The applicant filed for review of a compliance order in which an ESO found it to be in violation of the overtime provisions of the *Employment Standards Act* – The applicant, a family farm involved in the production of sweet corn, argued it was exempt from the requirement to pay overtime by virtue of the "farm worker exemption" – The two-part test to determine whether an employee falls under the farm worker exemption is: (1) the person must be employed on a "farm"; and (2) that person's employment must be "directly related" to the primary production of an agricultural product – The Board concluded the applicant failed to satisfy either prong of the test and the exemption accordingly did not apply – The Board adopted a narrow perspective on what constitutes a "farm" for the purposes of the Act, requiring it to have a nexus or connection to the location where the product is grown or raised – By this definition, the applicant's location did not constitute a farm as its employees were involved only in the cooling, trimming, grading and packing of corn, most of which was grown in distant locations – The Board reasoned this approach was consistent with the plain and ordinary meaning of the term, its narrow approach to interpreting exemptions from the Act, and the jurisprudence provided – For work to be "directly related" to primary production, the Board concluded the work must be done where the growing occurs with "immediate hands on" contact with the agricultural product – The work done at the applicant's location was not directly related to primary production as it was both geographically and temporally remote from where the sweet corn was actually grown – Application dismissed

ROUGE RIVER FARMS INC.; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0213-16-ES; Dated: March 8, 2017; Panel: Adam Beatty, Vice-Chair (18 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
Myriam Michail Divisional Court No. 624/17 **(London)**	**3434-15-U**	Pending
Peter David Sinisa Sesek Divisional Court No. 93/16	0297-15-ES	Pending
Women's College Hospital 24/17 Divisional Court No. 24/17	0830-15-M	Pending
Innovative Civil Constructors Divisional Court No. 611/16	0142-16-R	Pending
Yuchao Ma Divisional Court No. 543/16	2438-15-U	Pending
Ming Tang Divisional Court No. 452/16	3607-14-U	June 22, 2017
Anishinabek Police Service Divisional Court No. 455/16	0319-13-R & 1629-13-R	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 29, 2017
946900 Ontario Limited Divisional Court No. 239/16	3321-14-ES	Pending
S & T Electrical Contractors Divisional Court No. 406/16	1598-14-U	May 11, 2017
Carpenters (*Riverside*) Divisional Court No. 363/16	0630-16-R	Pending
Lee Byeongheon #2 Divisional Court No. 16-2219 **(Ottawa)**	0095-15-UR	June 15, 2017
Lee Byeongheon #1 Divisional **Court** No. 16-2220 **(Ottawa)**	0015-15-U	June 15, 2017
College Employer Council Court of Appeal No. M47343	0625-16-R	Dismissed March 10, 2017
Labourers' International Union of North America, Local 183 *(Alliance Site Construction Ltd.)* Divisional Court No. 133/16	3192-14-JD	Pending
R. J. Potomski Divisional Court No. 12/16 **(London)**	1615-15-UR 2437-15-UR 2466-15-UR	Pending

Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 095-16	0668-15-ES	Pending
David Houle Divisional Court No. 1021-16 **(Sudbury)**	0292-15-U	Pending
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	April 13, 2017
Kognitive Marketing Inc. Divisional **Court** No. 51/15 **(London)**	0621-14-ES	Week of November 27, 2017
W.H.D. Acoustics Inc. (Hannam) Court of Appeal No. M47477	3151-14-G 3716-14-R	Seeking leave to C.A.
Universal Workers Union, Labourers' International Union of North America, Local 183 *(Maystar)* Court of Appeal No. M47007	1938-12-R	Dismissed March 10, 2017
Valoggia Linguistique Divisional Court No. 15-2096 (**Ottawa)**	3205-13-ES	Pending

ONTARIO LABOUR RELATIONS BOARD
PROPOSAL FOR THE ELIMINATION OF WHITE AREAS
MARCH 2017

The Board would like to thank all those parties that provided submissions for its deliberations on the potential elimination of "White Areas" in the province. The Board has reviewed these submissions, considered the matter carefully and is now providing the community with an opportunity to respond to a specific proposal. All submissions on the Board's proposal should be submitted by **Friday, April 21, 2017** in the same manner as before: please email your submissions [re: Submissions on Proposal for Elimination of White Areas] to webolrb@ontario.ca. You may also forward a hard copy to the Director/Registrar at the Board's offices.

This paper describes the Board's proposal for eliminating the "White Areas." Attached you will find proposed descriptions of seven reconfigured Board Areas (12, 16, 17, 19, 20, 21 & 32) and one new Board Area [33: The District of Parry Sound]. Links are also provided to two maps (Board Areas 2017South and Board Areas 2017North) detailing only the proposed new boundaries for these eight Board Areas.

Below the Board addresses some of the concerns and issues raised in the submissions.

Concern re expansion of bargaining rights

1. The Board would like to clarify that the prospective elimination of the White Areas through the reconfiguration of existing Board Areas and the creation of one new Board Area does not affect current or existing bargaining rights nor does it expand them. Bargaining rights are defined either by a certificate or a recognition clause. The geographic scope of a bargaining unit defined in a previously issued Board certificate, or an existing collective agreement recognition clause, does NOT change, merely because the Board subsequently changes or creates new Board Areas. That is, the geographic scope of the bargaining unit remains as set out in the prior certificate or the existing collective agreement, as the case may be. If the Board proceeds to eliminate the White Areas, parties may, or may not, address and change the scope clauses in their collective agreements, when their collective agreements come up for renewal.

   Where the parties have referred in their recognition clause to a specific Board area (that has been reconfigured), rather than specific geographic boundaries, and the Board Area reference remains the same after a subsequent collective agreement, the effect, if any, where the parties have a dispute, must be determined at arbitration.

Status Quo is not acceptable

2. The Board began this process because it believed that the status quo was no longer acceptable. On review of the parties' submissions the Board continues to believe that it is time to eliminate the "white areas". The Board generally accepts that there are problems with the current "white areas" as set out in submissions made to it (see for example the submissions of the Labourers'):
    a. failure to ensure stable labour relations and bargaining patterns;
    b. uncertainty and some confusion in locating current projects in the "white areas";
    c. economic development in the North has now outstripped the continued existence of white areas.

Consultation with First Nations

3. The Board understands and does not question the First Nations interests in ensuring that the work that occurs on any projects on its lands be conducted in a safe, cost effective and timely manner. Furthermore, the Board also understands the First Nations interests in "ensuring that any Projects undertaken on its lands or within its traditional territories provides opportunities for its members to benefit from any employment and training opportunities that might be available through the Project". The Board is aware that the First Nations have often negotiated agreements with companies who are operating within their lands and traditional territories that specifically address how the First Nations will benefit from the Project. Finally, the Board understands that governments (including Ontario) have a duty of consultation where First Nations may be impacted by its decisions.

    That said, as the Board presently understands "Board Area" and "White Area," the elimination of "White Areas" (and replacement with "Board Area") will not diminish in any way the present ability of First Nations to address construction industry projects that may occur on their lands and territories. That is, the ability of First Nations to negotiate agreements with companies (whether unionized or non-unionized) that may operate on their lands or traditional territories will not change because of the elimination of, or change in the borders of, white areas. The First Nation, as the party engaging the contractor to work on their land, will have precisely the same power and ability to negotiate as they always have had. The potential change from "White Area" to Board Area will simply redefine a geographic area in which the Board will describe bargaining rights as they pertain to a particular union and employer. The geographic description of bargaining rights (even if the current practice of describing "white area" certificates were to remain unchanged) says absolutely nothing about the First Nations' abilities to determine which contractor (whether unionized or not) they wish to perform a contract and the nature of the agreements the First Nation wishes to enter into with that contractor.

Distinct and clear boundaries

4. Finally, the Board has attempted to make changes that reflect, as close as possible, boundaries that conform to the already clearly defined Districts, Municipalities, Counties and Cities and which do not disrupt any ongoing bargaining patterns. In this light you will note that the Board has moved to six northern Areas defined entirely by Districts (namely, Nipissing, Sudbury, Temiskaming, Algoma, Manitoulin, and Parry Sound). The District of Cochrane is split between the current Area 25 (north of the 50th parallel) and reconfigured Area 19 (south of the 50th parallel). Board Area 12 has expanded to include the entire County of Hastings and has been updated to reflect the current municipal boundaries. These reconfigurations require that some parts of the areas previously described by “circles” have been moved to other or new areas. The Board views these new boundaries as clear and distinct and ones that contractors, unions and the Board can easily follow and understand.

While the Board is interested in any feedback or comments any interested party may have, the Board would be particularly interested in receiving submissions from any party who thinks these potential changes will affect current bargaining patterns. Please provide very specific examples of how you think this would occur.

PROPOSED CHANGES TO BOARD AREAS
TO ELIMINATE "WHITE AREAS"

Area	June 2016	PROPOSED 2017
12	The County of Prince Edward, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland.	The County of Prince Edward, **the County of Hastings and the Municipality of Trent Mills (formally the Townships of Seymour, Cambellford, Hastings and Percy) and the Municipality of** Cramahe and all lands east thereof in the County of Northumberland.
16	Within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office.	**The District of Nipissing** [N.B. This does not include the southwest quadrant of the circle that is now in new Board Area 33 (District of Parry Sound].
17	Within a radius of 57 kilometers (approximately 35 miles) of the City of Greater Sudbury Federal Building.	**The District of Sudbury** [N.B. This includes part of the southwest quadrant that was old Board Area 19.]
19	Within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building.	**The District of Cochrane south of the 50th parallel** [N.B. This does not include part of the bottom half of the circle that is now in the District of Temiskaming (Area 20) and in the District of Sudbury (Area 17)]
20	The Town of Kirkland Lake and the geographic Townships adjacent thereof in the District of Temiskaming.	**The District of Temiskaming** [N.B. This includes part of the area that was old Board Area 19.]
21	That portion of the District of Algoma south of the 49th parallel of latitude.	**The District of Algoma** [N.B. limited increase in NW corner of district]
32	The District of Manitoulin (except that portion of the District of Manitoulin which comes within Board area #17).	**The District of Manitoulin**
33	NEW	**The District of Parry Sound**