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Ontario Labour Relations Board

HIGHLIGHTS

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April 2019

NOTICES TO THE COMMUNITY

Electronic Voting

The Board is seeking submissions regarding electronic voting. The Board's consultation paper is attached. Responses are requested by April 12, 2019.

New Part-time Vice-Chair

The Board welcomes Johanne Cavé as a new part-time Vice-Chair.

Johanne Cavé received her law degree from the University of Ottawa in 1996. She is also a certified mediator. Until 2018, Ms. Cavé worked as in-house counsel for large Canadian companies, practicing labour, employment, human rights and privacy law, including litigation. She received the Order of Merit from the Faculty of Law of the University of Ottawa in 2016. Ms. Cavé is fluent in French and English.

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 application - Pre-hearing production – Application under section 1(4) of the *LRA* in relation to AB and AMCL **–** Dispute as to whether the parties agreed to the production of some documents requested by the Applicant, and if not, whether the Board should order production of such documents – Applicant sought pre-hearing production relating to six ACML and 18 AB construction projects – AB and AMCL informed Applicant they were searching for some documents in the Applicant's request, but the process would be time consuming and there would be a large volume of documentation, making request grossly disproportionate to its relevance – AB and AMCL also took position that request was at least in part a "fishing expedition" – AB and AMCL asked the Board to not order any further pre-hearing production – ACML's preliminary search resulted in 575,510 emails and outside quote for cost reviewing documents would be $424,000 – AB's preliminary search resulted in 1,355,702 documents costing $691,432 – Board concluded there was no agreement to produce documents – An undertaking to search for documents, and the absence of a specific objection by the responding parties to produce the documents, does not establish an agreement to produce the documents – AB and AMCL reserved the right to argue all documents sought by Applicant were a fishing expedition – Board also declined to make further pre-hearing production order – Request covers almost every arguably relevant document created with respect to the 24 projects in question at a significant cost – Quality of evidence would be enhanced by production of any arguably relevant documents – Against that consideration must be weighed the consequences of making the production order sought by the Applicant – It is not reasonable to expect the responding parties to bear the cost of securing the documents – Order sought by the Applicant would unreasonably delay commencement of hearing on the merits, contrary

to the mandate set out in s. 2 of the *LRA* to "promote the expeditious resolution of workplace disputes" – No further pre-hearing production ordered

AECON CONSTRUCTION GROUP INC. (O/A AECON BUILDINGS); RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: AECON CONSTRUCTION AND MATERIALS LIMITED; RE: GRANDLINQ CONTRACTORS; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 1002-16-R; Dated March 7, 2019; Panel: Lee Shouldice (14 pages)

Certification – Construction Industry – Reconsideration – Procedural Fairness – Application for certification pursuant to section 128.1 of the *LRA* – After status submissions filed, Union asserted Employer's status submission failed to establish a *prima facie* case that a group of 18 persons listed on its Schedule "A" were in the bargaining unit – In initial decision, Board agreed, since Employer's submissions gave minimal details, insufficient to demonstrate that disputed individuals were in the bargaining unit for a majority of the day – Result of removing 18 disputed persons was to put Union in certifiable position, and certificate issued – Employer sought reconsideration on several grounds – Employer alleged it was denied procedural fairness as it was prevented from arguing its case due to a technical pleadings breach that could have been remedied without any adverse impact on the Union – Board underlined that no party has a right to a hearing respecting status disputes in the construction industry – Status disputes can be determined on the basis of written submissions and supporting documents – Employer further asserted that the Board's decision imposed a requirement upon it which was "unknown", namely "the need to state that the 18 operators in question operated the identified piece of equipment for the majority or entirety of the day" – Board referred to Information Bulletin No. 9 and the Board's direction to the Employer require a high standard of factual disclosure from an employer in status disputes in a construction industry certification application – Employer further asserted that a simple clarification could have rectified the situation without delay or prejudice – Board found that the passage of time since the exchange of status submissions meant that the situation could not be remedied by further particulars – The prejudice caused by the five-month delay in providing particulars would have been impossible to overcome – No denial of procedural fairness – Employer also argued the documents provided to the Applicant satisfied its obligation to particularize the time worked by the disputed individuals – Board reiterated that the documents do not speak for themselves and a party is not required to piece together material facts from documents – Employer further argued a reasonable apprehension of bias resulting from the Board's comment regarding its motivation for the pleading deficiencies, and that the Board improperly drew negative inferences which affected the fairness of its decision – No reasonable apprehension of bias – Board simply observed its concerns in other proceedings regarding the unnecessary litigation of status disputes – Reconsideration dismissed

ASL AGRODRAIN LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB File No. 1840-18-R; Dated March 22, 2019; Panel: Lee Shouldice (27 pages)

Unlawful strike – Application under section 100 of the *LRA* – IP and GM each filed applications under section 100 of the *Labour Relations Act, 1995* alleging unlawful strikes by Union and various officials – IP is supplier to GM's Oshawa plant – GM intervened in IP's application and filed its own – L, also a supplier to the GM Oshawa plant, also intervened in IP's application – Board consolidated the applications – Board considered a series of actions by the Union at IP, GM and L's locations, including work refusals, sit-downs, walkouts and a rolling blockade after GM announced its plans to close Oshawa plant – No dispute that strike activity was engaged in and that such strikes were unlawful – Only issue in dispute is Board's discretion to grant relief under section 100 – Board issued cease and desist order, declaratory relief and posting orders – Prohibition against strikes during currency of the collective agreement is central to the stability of labour relations in Ontario – Purpose of declaration is not to be punitive – The Board's approach is to refuse to issue a declaration or a cease and desist order where the work stoppage has ended before the hearing or the "strike has been resolved" – Three exceptions are set out in *Bechtel Canada Ltd.*, namely, where there is a past practice of unlawful strike activity; where it is likely that the unlawful activity will recur; or where the unlawful strike in issue has implications extending beyond the immediate parties – Union argued that IP, GM and

L could not make application under section 100 and that no declaration should be issued – Section 100 is deliberately restricted to an employer or an employer's organization and the employer must be the employer of the striking employees or the employer bound to the collective agreement violated by the unlawful strike – GM seeks to rely on strikes at IP or L, and IP and L seek to rely on strikes at GM – Board rejected this argument – Nothing in section 100 restricts it to employers vis-à-vis their own employees and not employees of another employer – No apparent statutory purpose to restricting the interpretation in that way when there is an unlawful strike by employees at one of its suppliers contrary to a collective agreement with the same local of the same union or another local of the same union – Union argued in the alternative that the work stoppages had been resolved and the *Bechtel Canada* exceptions do not apply – Board rejected this argument – First, there were several incidents of unlawful strike activity, and no reasonable basis to assume that as long as GM's decision remains to close the Oshawa plant that there will never be any more striking activity – Pattern of unlawful activity – Second, the underlying issue, the closure of the Oshawa plant, has not been resolved – Implicit in Unifor's argument that the union could engage in some illegal strike activity, but if it stopped before the Board deals with it, that should not concern the Board – The Board does not accept this premise and finds that there is a sufficient possibility that the unlawful conduct will recur to warrant a remedy – Third, the Board does not need to decide whether unlawful strikes have implications extending beyond the immediate parties as not all three of the *Bechtel Canada* exceptions need to be made out in order for relief to be granted – Either the first or second exceptions have been made out and either was sufficient to grant the relief – Application granted

INTEVA PRODUCTS CANADA ULC; GENERAL MOTORS OF CANADA COMPANY; RE: UNIFOR LOCAL 1090; RE: UNIFOR CANADA; RE: JOSH COLES; RE: STEVE BATCHELOR; RE: SHANE WARK; RE: COREY DALTON; RE: RICK WELSH; RE: BRIAN SMITH; RE: GREG AUCHTERLONIE; RE: LEAR CORPORATION; OLRB File Nos. 3155-18-U, 3396-18-U; Dated March 6, 2019; Panel: Bernard Fishbein, Chair (28 pages)

Personal emergency leave – Section 50 of the *ESA* – Referral of a grievance to arbitration under section 133 of the *LRA*, asserting Employer violated personal emergency leave provisions of the *Employment Standards Act, 2000* (the "*ESA*") by failing to pay for paid emergency day ("PED") – Employee ("MC") absent on February 19 and 20, 2018 and employee ("NB") absent on February 22 and 23, 2018 – Board satisfied that MC and NB were each suffering from personal illness on days in question – Employer argued MC and NB not entitled to be paid because they did not notify the employer, and MC not entitled to be paid as he was paid for February 19, 2018, which was Family Day – Employer had directed employees to contact General Foreman for all absences – MC advised his direct supervisor, not the General Foreman – NB sent text message to General Foreman both days to inform him of absence – Union argued notice requirements in sections 50(3) and (4) are not a condition of eligibility for PED – PED eligibility is automatic under section 50(1) as long as the reason for leave is encompassed by section 50(2) – Failure to provide notice may result in discipline, but cannot be a basis for denying the leave – Employer argued notice in accordance with section 50(3) or (4) is a requirement for leave – Alternatively, MC is not entitled to pay for February 19, 2018 because it is a statutory holiday for which he has already been paid – Board finds notification is not a prerequisite to taking a PED – Employee is entitled to take one or more PEDs as long as the reason for the absence falls within section 50(2) of the *ESA* – Grievors were absent from work due to personal illness and therefore "entitled to a leave of absence" under section 50(1) – Sections 50(3) and (4) oblige an employee taking a PED to advise the employer that he or she will be "taking leave under this section", but do not make the notice a prerequisite – Obligation to advise applies to all personal emergency leaves, both paid and unpaid – No language suggesting that an employee must communicate that he or she is taking a PED – Even if notification were a prerequisite, MC and NB complied with sections 50(3) and (4) by advising someone with authority over them they would be absent from work and that they were suffering from personal illness – NB entitled to pay for both days absent – MC entitled to pay for second day of absence, but not entitled to pay for first day of absence – Section 50(11) provides that if a PED falls on a public holiday, the employee is not entitled to premium pay for any leave taken under this section – "Premium pay" in section 50(11) not defined in the *ESA*, but clearly distinguished from other types of pay in the definition of "regular wages" in section 1(1) – MC did not work on Family Day, but he was paid for eight hours of work at his regular rate – Payment for work actually performed on the holiday pay is "premium pay" for the purposes of section 50(11) – Sections 50(11)

and 27(4) can be read in tandem as meaning that taking a PED is a "reasonable cause" for an employee's failure to attend and perform work scheduled on a public holiday – Pay that would have been earned by working the holiday and not receiving a substitute day off (premium pay) is not owed – Grievance allowed in part

THE STATE GROUP INC.; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 115; RE: ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE: IBEW CONSTRUCTION COUNCIL OF ONTARIO; OLRB File No. 3120-17-G; Dated March 15, 2019; Panel: Mary Anne McKellar (19 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – Unfair Labour Practice – Applicant sought judicial review of the Board's decision and reconsideration decision dismissing his duty of fair representation complaint – Applicant's original complaint to Board concerned Union's decisions in respect of grievances filed related to a voluntary severance package – Union determined to withdraw grievances – Applicant appealed to Union's appeal body which upheld original decision – Board concluded Union's decision not arbitrary, discriminatory or in bad faith – Applicant sought judicial review on several grounds – Court found that Board applied the correct test under s. 74 of the *LRA* – Court found that Board did not misapprehend the evidence before it as decision outlined evidence in detail – Court also found that Board's reasons were adequate, confirming that a tribunal is not obliged to comment on every issue raised by the parties before it – Finally, Court found that Board had not breached rules of natural justice in its treatment of a specific document – Document was known to Applicant and he had opportunity to challenge it or request that a witness be cross-examined in relation to it – Since these issues were not raised before the Board in the initial consultation, in the interests of finality in administrative decisions, the argument could not be pursued before the Court – Application dismissed

DENNIS McCOOL; RE: ONTARIO LABOUR RELATIONS BOARD; RE: THE SOCIETY OF ENERGY PROFESSIONALS; RE: ONTARIO POWER GENERATION; Divisional Court File No. 566/17; Dated March 7, 2019; Panel: Sachs, Thorburn, and Bale JJ. (10 pages)

Judicial Review – Displacement application – Carpenters filed an application seeking to displace to place the Labourers in a labourers bargaining unit of – In its response to the Application, the Labourers challenged the inclusion one employee ("S") on the list of employees on the basis that he was not a member of the Labourers' union or referred to work by the Labourers' – The Board determined that S and one other employee were in the bargaining unit on the application date – The Board refused to apply the *April Waterproofing* principle to exclude S from the bargaining unit – Labourers applied for judicial review of the Board's decision – Application dismissed – Board applied longstanding jurisprudence in determining whether S was doing "bargaining unit work" on the application date – Applicant relies on *April Waterproofing* principle – Applicant argued that where employees are represented by an incumbent union, only employees in the bargaining unit who were referred to work by the incumbent union, and are represented by the incumbent union, should make a decision on continued representation – The Board's interpretation of the words "in the bargaining unit" focused on the work being done by the employee – Court found that this was a reasonable interpretation – The Board also reasonably refused to apply the *April Waterproofing* principle, given the evolution in the Board's case law – An employee is not excluded from voting simply because he or she was employed in violation of the collective agreement – The Board looks at the conduct of the employer, the displacing union, the employee, and the displaced union and seeks to balance competing interests – This is a reasonable approach – The Board found there was no evidence of collusion or other suspicious circumstances among the employer, the Carpenters and S – Reasonably refused to apply the *April Waterproofing* principle – Application for judicial review dismissed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: HIGHCASTLE HOMES INC.; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 7/18; Dated March 11, 2019; Panel: Swinton, Wilton-Siegel, and Sheard JJ. (3 pages)

Certification – Construction Industry – Judicial Review – Responding Party in certification application sought judicial review of Board's decision certifying Union – Issue before the Board was identity of the employer – Board found that the Responding Party was the true employer – In the course of the hearing, Responding Party asked question of its witness, related to his dealings with individuals who were not on the Responding Party's Schedule "A", that was objected to by the Union – Basis of objection was concern that purpose of question was to inappropriately attempt to add more names to the Schedule "A" list of employees – Board concluded no arguable relevance to question given that Responding Party took the position that there were no employees in the bargaining unit on the application filing date and took no alternative position – Responding Party sought judicial review on the basis that the Board's ruling on the objection was unreasonable – Divisional Court concluded that Board's treatment of objection was reasonable – Status of individuals not on Schedule "A" not relevant to issues in dispute – Divisional Court also dismissed argument that the ruling was based unreasonably on the fact that Responding Party had not filed an alternative Schedule "A" – Responding Party had never sought leave of the Board to amend its Schedule "A", such that the Board had never addressed this position – Responding Party could not advance this argument before the Court as it had not been made to the Board – Application dismissed

TRISECT CONSTRUCTION CORPORATION; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 087/18; Dated March 19, 2019; Panel: Sachs, D.L. Corbett, and M. Edwards JJ. (6 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
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
Hector Yao Divisional Court No. 063/19	1841-18-ES	Pending
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 789/18	2375-17-G	Pending
Audio Visual Services (Canada) Corporation Divisional Court No. 732/18	2694-16-R	June 25, 2019
Kelly White Divisional Court No. 671/18	2032-17-ES	Pending
Tomasz Turkiewicz Divisional Court No. 601/18	2375-17-G	Pending
Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	July 25, 2019
The Daniels Group Inc. Divisional Court No. 535/18	0279-16-R	May 23, 2019
D. Andrew Thomson Divisional Court No. 238/18 **(Sudbury)**	1070-16-ES	Pending
Tomasz Turkiewicz Divisional Court No. 262/18	2374-17-R	Pending
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	Pending
Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	Pending
Trisect Construction Corporation Divisional Court No. 087/18	2553-15-R	Dismissed
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	May 22, 2019
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	Abandoned

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Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	June 18, 2019
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	June 13, 2019
Highcastle Homes Inc. Divisional Court No. 7/18	3196-15-R 3282-15-U	Dismissed
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Rouge River Farm Inc. Divisional Court No. 637/17	0213-16-ES	January 24, 2019
Dennis McCool Divisional Court No. 566/17	0402-16-U	Dismissed
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	Application for Leave to Appeal Granted – Appeal Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
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	Pending
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Pending
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