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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 November of this year. These decisions will appear in the November/December 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.

Evidence – Work Refusal – Application under Section 61 of *OHSA* appealing order of decision of Inspector – Inspector found no basis for work refusal initiated by teachers arising from violent actions of student with Autism Spectrum Disorder (ASD) – Responding parties objected to admissibility of expert report tendered by applicants – Board held that proposed evidence describing school board's steps to deal with student's violent actions and commenting on school's safety plan was relevant to whether teachers held a reasonable belief in likelihood of endangerment such that they were permitted to engage in a work refusal – In Board's view, evidence was necessary because what is or is not done to promote teacher safety from violent actions of a student with ASD is not a matter within Board's ordinary expertise – While relevancy and necessity requirements for admissibility established, Board considered additional matters of Board's role as "gatekeeper" and allegations of expert's lack of impartiality and bias – Board declined to exclude evidence on discretionary grounds – School board's actions or lack of action to protect teacher safety was relevant to whether teachers had a reasonable belief that they were likely to be endangered – It would be unfair to remove expert evidence regarding criticism of what the school board did and did not do when this may be material to the teachers' beliefs – Board held that the onus on responding parties to show that the expert could not carry out her responsibilities due to bias and impartiality was not made out – Alleged bias was derived from comments made online by the witness which were said to be negative toward the school board and Ministry inspectors, as well as allegedly self-interested comments in expert report – In Board's view, context for online comments was unclear and none of the comments disqualified the witness as an expert or demonstrated that she was incapable of being objective or independent – Rather, comments merely showed that witness had views and opinions on a range of matters which went beyond her area of expertise – Any issues in report for which expert is not qualified or which turn out to be irrelevant would not be relied on by the Board, but this was not a basis for rejecting the report in its entirety – Whether or not particular issues were before the Inspector did not bear on the admissibility of the report and was a matter of evidence and argument

DUFFERIN-PEEL CATHOLIC DISTRICT SCHOOL BOARD; RE: ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB File No. 0299-18-HS; Dated November 27, 2019; Panel: C. Michael Mitchell (10 pages)

***Hospital Labour Disputes and Arbitration Act* – Unfair Labour Practice under Section 82 of the *LRA* –** Union argued that employer violated *LRA* and *HLDAA* by excluding recently-certified technologists from general wage increase – Historically, employer provided annual wage increases every April 1 – Employer argued that including technologists would have violated "statutory freeze" provisions of the *LRA* by altering employees' rates of wages – Board held

technologists reasonably expected to be included in compensation adjustments – Board found that the employer violated the *LRA* and *HLDAA* by failing to include technologists in wage increases – *LRA* and *HLDAA* preserve a pattern of employment during the freeze, not the terms as they existed when the application for certification was filed – Board has consistently rejected the position that the statutory freeze preserves conditions of employment in place when application for certification was filed – Permitting changes that are part of an established pattern and are within the employees' reasonable expectations strikes an appropriate balance of the parties' interests – Board held that biomedical technicians reasonably expected they would receive the compensation adjustments – Practice of treating technologists like most of employer's non-union employees was sufficiently well-established so as to have created reasonable expectation – Board held that employer violated s. 86 of *LRA* and s. 13 of *HLDAA* when it did not include the technologists in the wage adjustments – Board directed the employer to include the technologists in the wage adjustments

TRILLIUM HEALTH PARTNERS; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No. 0229-19-U; Dated November 25, 2019; Panel: Paula Turtle (13 pages)

Practice and Procedure – Unfair Labour Practice – Board addressed two preliminary issues: 1. Whether one of respondent companies was federally regulated and thus beyond the jurisdiction of the Board; 2. Whether to grant request to amend pleadings to add additional respondents, add paragraphs to pleadings, and substitute specific references to the employer for individual respondents – No dispute over jurisdictional issue; company federally regulated – Removed as responding party – Board went on to address request to amend – After certification vote, employer announced it would cease operations – Union asserted decision to close violated ss. 70, 72, 76, and 86(2) of *LRA* and decision was made by federally regulated parent of employer – Union sought to add five individual named responding parties in place of federally regulated entity – Individuals were allegedly present at meeting in which decision to shut down employer was taken – Board set out factors to be considered: 1. Is there an employer in the proceedings also alleged to be liable for conduct?; 2. Is there an issue raised as to employer's deemed or vicarious liability for conduct of personal responding party seeking to be removed?; 3. Is there any issue as to the ability of the employer to respond to or remedy the alleged infringement of the Act?; 4. Is there any compelling labour relations or adjudicative reason to continue the proceeding as against the personal responding party?; and 5. Would any prejudice be caused to any party as a result of removing the personal responding party? – Board held this was an appropriate case to add the responding parties – Principal reason was that if the union were to establish the alleged unfair labour practices, it could nonetheless be left without an effective or meaningful remedy – Adding parties was consistent with factors enumerated above – Labour relations and adjudicative purposes would be served by naming responding parties – Fact that the potential inability of the employer to meet a remedy ordered by the Board was not proven by evidence was not fatal to the union's request to add respondents – To wait until such a determination was made would invite prejudice – Naming individual responding parties would assist with compelling production of arguably relevant documents – Fact that individual responding parties were directors and officers of federally regulated entity did not shield them from being named as responding parties – No prejudice to individual responding parties as no evidence had yet been heard – Request to add responding parties granted – Board considered additional requests to amend pleadings – Relevant consideration was whether any parties would be prejudiced – No prejudice would occur in this case – No evidence yet adduced and applicant had not sat on new information it sought to include

1022804 ONTARIO INC. O/A MOTOR EXPRESS TORONTO; RE: TEAMSTERS LOCAL UNION 938; RE: DOUGLAS A. SMITH; RE: GORDON SMITH; RE: JEFF SMITH; RE: CLIFF BARNES; RE: DON GOODWILL; OLRB File No.: 0529-19-U; Dated November 20, 2019; Panel: Adam Beatty (9 pages)

Related Employer Application – Unfair Labour Practice – Whether Board should exercise discretion under s. 1(4) of the *LRA* to issue a related employer declaration – Applicant union sought declaration that Jacques Carrier & Sons Construction Ltd. ("JCS") and CFCW Construction Inc. ("CFCW") were one employer for the purposes of the *LRA* – Responding parties conceded that statutory requirements for declaration under s. 1(4) of the *LRA* were met but argued that Board should decline to make such a declaration on discretionary grounds because of the intervenor union's pre-existing bargaining rights – Responding parties and intervenor union submitted that the Board's

jurisprudence demonstrated that it is very reluctant to issue a related employer declaration which would bind an entity to conflicting collective agreements that would generate inevitable jurisdictional disputes concerning the same group of employees – Responding parties and intervenor union argued that there would be no labour relations purpose in making the declaration as doing so would inevitably generate jurisdictional conflict – Board held that no adverse inference was to be drawn from fact that intervenor union did not call certain witnesses because the initial scope of the inquiry did not put the validity of CFCW's bargaining rights with the intervenor union at issue – Board found that personal respondent's testimony disclosed the mischief to which subsection 1(4) of the Act was directed – Personal respondent agreed he was ultimately responsible for both entities – Board agreed that it typically will not issue a related employer declaration in circumstances that would create conflicting bargaining rights, as it would not advance any labour relations purpose – However, Board held that this is not the automatic result regardless of the circumstances – Unique circumstances in the instant case required a consideration of the overall context – Prior Board decisions had not allowed the applicant union to attack the validity of the Framing Agreement with the intervenor union – Personal respondent's *viva voce* evidence was sufficient for the Board to conclude that mischief was present – Despite initially limiting the scope of proceedings, the Board had evidence that could not be ignored – Evidence disclosed that JCS and the personal respondent participated in the creation of CFCW and almost immediately recognized the Carpenters, leading to an erosion of the applicant union's bargaining rights – Board required to balance labour relations harm that would result if no declaration was made against the labour relations harm that may result from creating conflicting bargaining rights resulting in jurisdictional disputes – Respondents argued that Board lacked statutory authority to read down the CFCW/Carpenters' Framing Agreement where there is no other provision of the *LRA* alleged to have been violated – Board exercised discretion to make a related employer declaration as between JCS and CFCW – Board held that evidence disclosed mischief and declaration was needed to give effect to purpose of s. 1(4) –In order to minimize the conflict between bargaining rights and potential for jurisdictional disputes, and in light of the original scope of the inquiry and the fact that mischief was not apparent until the end of the evidentiary portion of the case, the Board held the effective date of the declaration was the date of issuance of earlier reconsideration decision – Request to read down CFCW/Carpenters' Framing Agreement held in abeyance until determination of unfair labour practice complaint – Board declared JCS and CFCW to be one employer for all purposes of the *LRA* and CFCW was bound to the same collective agreement to which JCS was bound

JACQUES CARRIER & SONS CONSTRUCTION LTD.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: CFCW CONSTRUCTION INC; OLRB File No.: 1382-16-R; Dated November 22, 2019; Panel: John D. Lewis (25 pages)

COURT PROCEEDINGS

Constitutional Law – Judicial Review – Certification – Whether Ontario's presumptive jurisdiction over labour relations in province was displaced through "derivative jurisdiction" such that federal labour law applied to construction technicians – Employer provided services as a third-party contractor primarily to federally regulated telecommunications companies – Union applied for certification under construction industry provisions of *LRA* – Employer opposed certification on basis that construction technicians performed essential work for federally regulated telecommunications companies and thus labour relations should be federally regulated – Board disagreed that presumption of provincial jurisdiction was displaced and granted certification as a provincially regulated bargaining unit – Board held that simply building a federal undertaking is not vital or integral to the operation of a federal undertaking – Work given to employer was neither permanent nor particularly secure – On appeal, Divisional Court found construction technicians were engaged derivatively in work that was vital, essential, or integral to a federal undertaking and should therefore be federally regulated – Divisional Court found that employer's work was essential to the functioning of the telecommunications network – Board's decision quashed – Union appealed to Ontario Court of Appeal – Court of Appeal held that Divisional Court erred by failing to give effect to Board's finding that employer's main telecommunications company client was not dependent on services of employer's construction labourers – Divisional Court failed to consider whether effective performance of telecommunications network was dependent on the particular employees under scrutiny – Court of Appeal held that this was clearly not the case – Employer was a local work and did not itself own or operate federally regulated telecommunications

network, nor was it an integral part of a telecommunications network such that derivative jurisdiction was established – Employer did not contend it was subject to federal jurisdiction until the union brought its application – Board held that the determination is to be made by considering the relationship from the perspective of the federal undertaking and of the construction work said to be integrally related, assessing: 1. How important the employer's construction services for the federal undertaking were to the employer's construction division, and 2. The extent to which the effective performance of the federal undertaking was dependent on the employer's construction services – While federal undertakings formed overwhelming part of activities of the employer's construction division, employer's primary telecommunications client had since ceased using employer's construction technicians and, more importantly, effective performance of telecommunications network was not in any way dependent on employer's services – Divisional Court erred by considering extent to which delivery of telecommunications services by telecommunications companies was dependent on the performance of the type of work performed by the employer's construction technicians – The proper scope of the analysis was the extent to which the telecommunications companies were dependent on the services performed by the particular employees under scrutiny – Since the Board had clearly found that the telecommunications companies were not dependent on the employer's construction technicians, no exceptional federal jurisdiction could be found – However, the Court of Appeal disagreed with the Board to the extent that its reasons suggested that there is a special presumption that the labour relations of the construction industry are provincially regulated – Rather, there is a provincial presumption over labour relations generally – Appeal allowed, Board's order restored

RAMKEY COMMUNICATIONS INC; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: UTILITY CONTRACTORS ASSOCIATION OF ONTARIO; RE: ONTARIO LABOUR RELATIONS BOARD; Court of Appeal File No. C66613; Dated November 1, 2019; Panel: Hoy A.C.J.O., Tulioch and Jamal JJ.A. (28 pages)

Judicial Review – Reprisal Application under Section 50 of *OHSA* – Reprisal application brought pursuant to s. 50 of *OHSA* alleging that applicant's former employer dismissed her from employment in reprisal for her complaints of harassment – Application was dismissed and request for reconsideration refused – Applicant sought judicial review of decision – Standard of review was reasonableness – Regardless of whether OLRB lacks experience in the housing cooperative sector, application of reasonableness standard has been directed by the Supreme Court of Canada – Applicant argued that the Board erred on 5 grounds: 1. Failing to understand that the reprisals were not limited to termination alone; 2. Misunderstanding the impact of the fact that the employer is a housing cooperative; 3. Reversing the burden of proof under s. 50 of *OHSA*; 4. Effectively amending the applicant's employment contract; and 5. Refusing to allow the applicant to adduce a witness statement in her reconsideration application – Court concluded: 1. Board specifically considered other alleged reprisals and findings were anchored in the evidence it recited; 2. Nothing turned on the fact that the employer was a housing cooperative rather than a business corporation; 3. Board was alive to the legal burden and its decision established that employer had met the burden; 4. Board's finding that applicant employee was required to accept directions of employer's board of directors was reasonable; and 5. Since witness had attended hearing and was available as possible witness, Board reasonably held that it was not appropriate to receive statement after hearing had concluded – Board's decision was justified and reasoning was transparent and intelligible – Application dismissed

ALICIA R. ALLEN; RE: EAMON PARK HOUSING COOPERATIVE INC; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 18-199; Dated November 27, 2019; Panel: Kiteley, Baltman, and Myers JJ. (13 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
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
Kuehne + Nagel Ltd. Divisional Court No. 392/19	1172-18-R	November 22, 2019
Todd Elliott Speck Divisional Court No. 371/19	1476-18-U	April 29, 2020
ASL Agrodrain Limited Divisional Court No. 19-DC-2492 **(Ottawa)**	1840-18-R	November 21, 2019
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	Pending
Hector Yao Divisional Court No. 063/19	1841-18-ES	February 20, 2020
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
Kelly White Divisional Court No. 671/18	2032-17-ES	Dismissed
Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	July 25, 2019
D. Andrew Thomson Divisional Court No. 238/18 **(Sudbury)**	1070-16-ES	Dismissed
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019

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Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	Dismissed
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	Dismissed
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	December 18, 2019
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
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	October 21, 2019
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
LIUNA *(Pomerleau Inc.)* Divisional Court No. 257/17	3601–12–JD	Abandoned
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