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Ontario Labour Relations Board HIGHLIGHTS

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NOTICES TO THE COMMUNITY

New Board Solicitor

Lindsay Lawrence joined the Ontario Labour Relations Board in 2020, after many years in private practice at a prominent labour law firm. While in private practice, she regularly appeared before the Board, as well as at the Human Rights Tribunal, and in private labour arbitration matters. She was also a contributing editor for the leading text Ontario Labour Relations Board Law and Practice. She has an undergraduate degree from McGill University and a law degree from the University of Toronto.

SCOPE NOTES

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

Access to Documents in Adjudicative Files – Board Policy – Health and Safety – Appeals of several inspectors' orders under s. 61 of *OHSA* – Toronto Star requested access to Board files – Application concerning proceeding commenced prior to effective date of *Tribunal Adjudicative Records Act* – Board Policy applied – Fiera asked the Board to refuse the Toronto Star's access request because it was not properly particularized – Board held that a party requesting access will typically not know exactly what is in the Board's file and it would be unfair to expect detailed particulars – Fiera further argued that request for access was premature because no documents had been introduced into evidence – Board held that application was not premature because an application and response had been filed and processed by the Board, and these documents were part of the adjudicative record – Board rejected Toronto Star's position that documents not yet introduced as evidence form part of the record – Board reviewed governing principles – Board noted that prior jurisprudence has drawn a distinction between administrative tribunals and courts – Board's policy requires consideration of the parties' privacy interests in light of the implied undertaking rule and the open court principle, including consideration of any statutes or factors deemed appropriate – Other factors included the history of the cases before the Board and the Board's statutory purpose and procedures – Board declined to decide whether documents filed with the tribunal but not yet admitted as evidence constituted part of the "adjudicative record" – Board must account for the fact that the pre-hearing level of pleading and disclosure is often much broader and earlier in the litigation process at the Board than in civil proceedings – To find all documents filed with an application or as part of prehearing disclosure to be part of the adjudicative record would inhibit the objective of expeditious identification and resolution of disputes – Board ordered applications, field visit reports, and responses to be disclosed – Field visit reports had already been publicised and were the very basis for the appeal, so Board held they ought to be disclosed – As to documents Fiera objected to producing, Board drew distinction between pleadings (where a party sets out material facts supporting its position) and documents attached to pleadings (which may be the evidence on which the facts will be proven if the matter proceeds) – Toronto Star was not entitled to several documents where it was unclear whether they would be relied upon and admitted as evidence

at the hearing – Ministry of Labour agreed to production of the documents attached to its response, so the Board directed these to be disclosed – Board also ordered the following documents disclosed: 1. Notices of hearing; 2. Interlocutory orders; 3. Decisions of the tribunal and reasons, where given; 4. Dockets or schedules of hearing; and 4. Registers of actions or proceedings kept by the tribunal – Board held that Toronto Star's request for ongoing disclosure was premature – Given the order, Fiera's request for a confidentiality order was moot and would be dealt with on resumption of the hearing as necessary.

FIERA FOODS COMPANY; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB Case No.: 0842-18-HS; Dated December 2, 2019; Panel: Paula Turtle (17 pages)

Certification – Construction Industry – Disclosure – In response to Board's production order, responding party claimed litigation privilege over series of text messages and employee statements related to work performed on application filing date – Text messages were created after counsel directed gathering information as to which individuals were at work on application filing date – Responding party argued that these documents were created in anticipation of litigation – Union argued litigation privilege did not attach to documents – Board applied test for litigation privilege set out in *Blank v. Canada*, [2006] 2 SCR 319 and *R. v. Assessment Direct Inc*., 2017 ONSC 5686 – Party claiming litigation privilege must show that document at issue was created for dominant purpose of litigation – Although documents were gathered after litigation commenced, documents did not reveal counsel's strategy, the tact counsel would take, or the approach that was to be taken in litigating the matter – Rather, documents simply solicited and encompassed "base information," namely who was present on the application filing date, what they were doing and when – Documents were not of the type to be covered by litigation privilege – Even if litigation privilege applied, in the instant case it would be appropriate to facilitate their admittance into evidence pursuant to Board's discretion – Board directed production of documents at issue – Extent of disclosure of employee statements limited to individuals whose status remained in dispute in matter.

PACIFIC HARDWOOD LIMITED C.O.B. AS RELIABLE LUMBER PRODUCTS, RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB Case No.: 0989-19-R; Dated December 27, 2019; Panel: Roslyn McGilvery (7 pages)

Certification – Construction Industry – Displacement Applications – Bargaining Unit Description - LIUNA Local 183 and Carpenters Local 1030) sought to displace CLAC as bargaining agent for certain employees – Dispute over bargaining rights description in each case – Local 183 submitted that the Board should issue two certificates, one for ICI sector bargaining rights for construction labourers and carpenters engaged specifically in ICI sector concrete formwork, and one for non-ICI sector bargaining rights for both construction labourers and carpenters, and further that both certificates should be province-wide in scope – Employer and Local 1030 argued that any bargaining rights acquired by Local 183 should be restricted to construction labourers in the non-ICI sectors in only Board Area 8, or in the alternative, to construction labourers in the ICI sector province-wide and construction labourers in the non-ICI sectors in Board Area 8, the only area in which affected employees were working on the application date – Employer and Local 1030 argued that the Board must apply s. 158 of the *LRA* to any application where ICI sector bargaining rights are sought, and that both the original and modified bargaining units proposed by Local 183 were prohibited by the *LRA* – Board summarized applicable legal principles – First, in displacement applications, including in the construction industry, the Board strongly favours granting a bargaining unit description that mirrors the bargaining unit existent between the incumbent trade union being displaced and the employer – Second, the mirroring principle is favoured by the Board because following it is likely to sustain the stable pre-existing pattern of labour relations – Third, the mirroring principle is not absolute and the Board may decline to depart from a strict mirroring approach when such departure is warranted – Fourth, the Board is not required to grant the most appropriate bargaining unit, but instead tends to grant the bargaining unit requested by an applicant provided it is an appropriate one – In Board's view, granting the bargaining rights applied for was plainly mandated by the above principles – The bargaining rights sought closely mirrored the incumbency bargaining rights subject to the necessary modifications required to comply with the *LRA* – Context of displacement application meant that employer had already agreed that bargaining rights in the non-ICI sectors for construction labourers and carpenters should be province-wide, and no good reason to derogate

from this was advanced – Board was not persuaded by objections to bargaining rights description – Application was not to be treated as a greenfield application.

LIV DEVELOPMENTS LTD; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: AARON ROQUE HOLDINGS LIMITED; RE: LIV COMMUNITIES; RE: LANDMART HOMES; RE: CONSTRUCTION WORKERS UNION, CLAC LOCAL 6; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837; OLRB Case No.: 3741-18-R; Dated December 12, 2019; Panel: Michael McFadden (13 pages)

Certification – Displacement Application – Electronic Membership Evidence – In prior decision, Board had directed representation vote pending decision on use of electronic membership evidence – Applicant's request to use such evidence was unopposed – Board allowed the applicant to rely on electronic membership evidence – Board has historically required the original version of the membership card be filed with applications for certification – The *LRA* does not stipulate the form in which membership evidence must be submitted – The Board's Rules of Procedure do not preclude electronic membership evidence – It was open to the Board to accept electronic membership evidence provided it met the requirements of the *LRA* and the Board's Rules of Procedure – Applicant had explained the steps it took to verify and protect the authenticity of the electronic membership evidence – Board satisfied that it was able to assess whether 40 per cent or more of the individuals in the proposed bargaining unit appeared to be members of the union at the time the application was filed – Arguably, security features used created stronger protections than traditional membership cards – Individual and organizer both required to electronically sign and verify their identity, and electronic membership card was encrypted and could not be modified – Board persuaded that the evidence satisfied the requirements of the Act – Applicant's request to open the ballot box and count the ballots granted.

TORONTO AND YORK REGION LABOUR COUNCIL; RE: UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS); OLRB Case No.: 2512-19-R; Dated December 24, 2019; Panel: Matthew R. Wilson (8 pages)

Constitutional Law – Jurisdiction – *School Boards Collective Bargaining Act* – Government amendment to class size regulation after memorandum executed for central bargaining, which included class size within the scope of bargaining - Union alleged that Crown had violated the "statutory freeze" and "duty to bargain in good faith" provisions of the applicable legislation, as well as s. 2(d) of the *Charter* – Crown argued that Board lacked jurisdiction to hear *Charter* arguments raised by union – Board held that it had jurisdiction to do so – Applicability of the *LRA* to the Crown (or Crown immunity from the *LRA*) was altered by the explicit provisions of the *SBCBA* – *SBCBA* provides that the *LRA* applies only to the extent necessary to enable the Crown to exercise the Crown's rights and privileges and perform the Crown's duties under the *SBCBA* – Both *LRA* and *SBCBA* contain statutory freeze and duty to bargain in good faith provisions – Parties agreed that Board has the jurisdiction to determine any question of law arising out of matters before it including issues under the *Charter* – Crown argued that Board lacked jurisdiction to hear stand-alone *Charter* challenges unnecessary to the matter before it, or to determine whether legislation violates the *Charter* if such a decision is unnecessary to the matter before the Board – Crown argued that in determining class sizes it was acting in its unfettered discretion as the government in funding education and setting education policy, with the exercise of its authority unaffected by either the *LRA* or the *SBCBA* – Board concluded alleged violation of *LRA* and *SBCBA* was properly before the Board – Board could potentially find that the applicable statutes do not apply to the Crown, or that the Crown's conduct did not violate the statute – Since union had also raised issue of whether the Crown's conduct violated s. 2(d), if Crown's conduct otherwise did not violate the relevant statutes, Board could not "duck" the *Charter* issue – Fact that changes to class sizes implemented via amendments to *Education Act* regulations was not relevant, as the Board regularly applies or considers the *Education Act* and its regulations – Crown further argued that the Board lacked the jurisdiction to grant the *Charter* relief sought by the union, namely a declaration that the class size regulation was null and void – Union clarified it was not seeking a general declaration, but rather that in the proceedings the Board find that the regulation is

inoperative between the parties in the proceedings – The Board's ability to do so was not disputed by the Crown – Crown's preliminary motion dismissed.

THE CROWN IN RIGHT OF ONTARIO; RE: ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION; RE: ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE: ONTARIO CATHOLIC SCHOOL TRUSTEES' ASSOCIATION; OLRB Case No.: 1747-19-U; Dated December 4, 2019; Panel: Bernard Fishbein (12 pages)

Construction Industry – Grievance – Discretion to Refuse Grievance Referral – Grievance was referred to expedited arbitration pursuant to the collective agreement – Private arbitrator issued preliminary decision including prehearing production order – Employer subsequently filed grievance referral to Board – Union requested that Board refuse to accept the grievance referral pursuant to s. 133(4) of the *LRA* – Employer argued that s. 133(1) of the *LRA* provided the Board with jurisdiction to hear any grievance referral notwithstanding any grievance and arbitration process contained within a collective agreement, and that the applicable collective agreement explicitly contemplated referral to the Board at any time – Board held that onus lies with party requesting that the Board refuse to accept the referral subject to s. 133(4) – Board agreed with employer's submission that an agreed-upon arbitrator roster in a collective agreement does not usurp the Board's jurisdiction to accept a grievance referral under s. 133(1) – However, Board found that union had provided a compelling reason for why the Board should exercise its discretion to refuse the grievance referral pursuant to s. 133(4) – Board held that the factual determination about whether a board of arbitration has been constituted prior to the grievance referral is a significant factor in the exercise of the Board's discretion – Both parties had agreed to the arbitrator's jurisdiction to issue a final and binding decision on the merits – Board held that there was no basis to conclude that the parties agreed that the arbitrator was no longer seized after deciding the preliminary issues – Grievance referral was not concurrent with referral of the grievance to privately negotiated arbitration; rather, the board of arbitration was clearly "constituted" – Concern over "forum shopping" heightened once alternate proceeding commenced – Board held that s. 133(1) instructs the Board to disregard the language of the collective agreement when considering whether to refuse a grievance referral and to instead focus on the steps that have already taken place under the privately negotiated grievance and arbitration process – Board exercised discretion not to accept grievance referral – Application terminated.

DOWNSVIEW DRYWALL CONTRACTING; RE: THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES (ONTARIO COUNCIL) AND LOCAL 1891; OLRB File No.: 2451-19-G; Dated December 10, 2019; Panel: M. David Ross (9 pages)

Grievance – Construction Industry – Drug and Alcohol Testing – Post-Incident Testing – Employer in the business of renting and operating cranes – Union challenged post-incident testing portion of drug and alcohol policy unilaterally implemented by employer – Union did not challenge employer's right to implement a drug and alcohol policy generally – Only issue before the Board was whether post-incident testing provisions contravened the *Human Rights Code* or the collective agreement – Board noted that law is clear that in safety sensitive environments, employers have the right to implement post-incident testing provided they conduct a reasonable investigation that takes into consideration the privacy rights of employees and balances those rights with its interests in maintaining a safe work environment – Board reviewed jurisprudence on post-incident testing – Union argued that proper balancing of interests required supervisor to have some suspicion that employee might be impaired – Board disagreed with union's position on two grounds – First, the reality is that impairment is difficult to detect and it is not necessary for a supervisor to draw conclusions about impairment based on physical observation – Second, the purpose of the investigation is to maintain a safe work environment, not gather incriminating evidence – Board held that union's argument conflated reasonable-cause testing with post-incident testing – Arbitrators have not required suspicion of impairment for post-incident testing – Board considered three elements for justification of post-incident testing: 1. The threshold level of incident needed to justify testing; 2. The degree of inquiry necessary before decision is made; 3. The necessary link between the incident and employee's situation to justify testing – On each issue, Board held: 1. Policy required supervisor to determine whether there was a significant incident by listing the factors to be considered, eliminating trivial incidents and precluding an overzealous supervisor from demanding a test without justification; 2. Testing was not automatic; supervisor was required to consult with members of management before requiring testing to ensure that steps were followed; 3. Evidence indicated that employer intended to

satisfy accommodation obligations on a case-by-case basis, and policy required investigative steps to determine if there was a link between incident and the employee's situation so as to justify testing – Board rejected union's argument that supervisor must have reasonable basis to suspect that employee was impaired before testing – Rather, inquiry is whether there is a link between the incident and the employee's situation – Board held that employer's policy did not violate the collective agreement or the *Human Rights Code* – Grievance dismissed.

MAMMOET CANADA EASTERN LTD.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB File No.: 0491-17-G; Dated December 11, 2019; Panel: Matthew R. Wilson (19 pages)

Grievance – Construction Industry – Timeliness – Grievance alleged violation of obligation in collective agreement to provide weekly notices of the jobs – Employer failed to provide said list for three weeks – Employer conceded that it had not complied with its obligations under the collective agreement, but argued that grievance was filed after the time limit for doing so established by the collective agreement – Board held that timeliness objection had merit – Initial claim had put employer on notice of its claim for at least one of the periods at issue – However, by the time the grievance was filed, employer could do nothing to remedy any of its violations of the collective agreement – Collective agreement set out that parties desired to resolve grievances "as quickly as possible" – Board held that s. 48(16) of the *LRA* provides latitude to grant an extension where reasonable grounds exist and the opposite party will not be substantially prejudiced – Board held that union had failed to establish reasonable grounds for an extension – Grievance dismissed.

CONTROLLED DEMOLITION GROUP INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB Case No.: 2418-19-G; Dated December 16, 2019; Panel: Lee Shouldice (10 pages)

COURT PROCEEDINGS

Application for Certification – Construction Industry – Judicial Review – Procedural Fairness – Union sought certification pursuant to s. 128.1 of the *LRA* – Status disputes arose and both parties exchanged written status submissions – Union argued employer failed to plead sufficient material facts and failed to comply with Board's Information Bulletin No. 9 by not specifying the hours each individual worked – Board held employer's pleadings were deficient and failed to raise a *prima facie* case for the inclusion of 18 employees in the bargaining unit because it did not specify the hours worked by each employee – Board rejected employer's request to amend its pleadings on the basis it would result in significant prejudice to the union – Board granted certification on the basis of the card count – On reconsideration, Board rejected employer's argument on procedural fairness and reasonable apprehension of bias – On judicial review, employer argued: 1. Board denied it procedural fairness by imposing a higher standard for pleading requirements than what is set out in Information Bulletin No. 9; and 2. Employer should have been given opportunity to amend its pleadings – Court rejected employer's argument on procedural fairness as the Board applied a longstanding standard of pleadings for status disputes in the construction industry – Court reasoned there should have been no surprise that the employer was required to plead the work done and time spent on that work in a status dispute – Further, Information Bulletin No. 9 is a guide, not a statute, and should be understood within the context of legislation and Board jurisprudence – Court determined Board was owed deference regarding the decision to refuse to permit the amendment to the employer's pleadings – Court concluded the refusal was a reasonable exercise of the Board's discretion and consistent with its jurisprudence – Application dismissed.

ASL AGRODRAIN LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS; Divisional Court File No.: 19-DC-2492; Dated December 12, 2019; Panel: Swinton, Favreau and Copeland JJ. (8 pages)

Certification – Judicial Review – Statutory Interpretation – Employer objected to certification under s. 15 of the *LRA*, alleging that the union discriminated against its own employees on the basis of age in its constitution and in collective agreements it reached on behalf of employees in other workplaces – Board held that, even if the facts alleged by the employer were true, they did not engage s. 15 of the *LRA* – Employer sought judicial review, arguing decisions were incorrect or unreasonable and procedurally unfair – As to procedural fairness, employer complained that Board did not hold an oral hearing and made

its decision in the absence of evidence – Court did not accept this argument – Rule 39.1 of the Board's Rules of Procedure permit it to dismiss an objection without a hearing – Court held that there was no need to hold a hearing because even if the alleged facts were true, its s. 15 objection was unfounded – Employer complained that Board had limited length of reply submissions – Court found no indication that Board failed to respect its own procedures or that they resulted in any unfairness – Standard of review was reasonableness – Board was interpreting its home statute (the *LRA*) and not the Ontario *Human Rights Code* or the *Charter* – Board was not determining a question of law of central importance outside the scope of its expertise – Alleged discrimination unrelated to membership in the proposed bargaining unit, had not been raised by employees of the employer and had not been the subject of a discrimination complaint by any other person – Board applied accepted principles of statutory interpretation – Court agreed with Board's observation that the interpretation advanced by employer would yield an absurd result and cause undue uncertainty and delay – Employer was effectively asking the Board to find that union was disqualified to represent any employees in any workplace – Application dismissed.

KUEHNE + NAGEL LTD.; RE: UNIFOR; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No.: 392/19; Dated December 16, 2019; Panel: D.L. Corbett, Ducharme, and Gomery JJ. (4 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
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
Community Care Access Centers (PEHT) Divisional Court No. 720/19	0085-16-PE - 0094-16-PE	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	April 29, 2020
ASL Agrodrain Limited Divisional Court No. 19-DC-2492 **(Ottawa)**	1840-18-R	Dismissed
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

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Amec Foster Wheeler Americas Limited Divisional Court No. 537/18	2743-16-R 3025-16-R	Dismissed – at Motion for Leave to Appeal
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
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 SCC 38979
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	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