

*H*ighlights

Ontario Labour Relations Board

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February 2016

CHAIR RE-APPOINTED

The Board is pleased to announce that **Bernard Fishbein** has been re-appointed to a second five-year term as Chair of the Board.

NEW VICE-CHAIR

The Board welcomes **Gita Anand** as a full-time Vice Chair. Ms. Anand represented private and public-sector management-side clients in labour relations, employment law and litigation matters at a national law firm, where she appeared widely before labour boards, arbitrators, tribunals and courts. She also acted as an independent investigator/fact-finder in the public and private sectors, conducting workplace investigations involving employment-related issues. Ms. Anand holds degrees from Mount Allison University, Dalhousie University and the London School of Economics.

SCOPE NOTES

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

Employment Standards – The applicant sought payment for the time spent travelling along a private road from a gatehouse to the fish farm

where he worked, a distance of some nine kilometres that took between 20 and 40 minutes, depending on the weather, the road surface and any obstacles that might be blocking the road – The applicant initially drove his own vehicle to the farm, but later made use of a company truck provided for the employees at the gatehouse – The Employer argued that the employees' start-time commenced with their shift, and not earlier; the travel on the private road was part of the employees' commute and not compensable – The applicant provided no evidence of his arrival times when using his own vehicle; nor did he provide any evidence of performing any work for the Employer during his travel from the gatehouse to the farm (or back) – Application dismissed

3359492 CANADA INC. O/A MEEKER'S AQUACULTURE O/A BLUE GOOSE; RE: NOAH ALLISON; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0244-15-ES; Dated January 27, 2016; Panel: Derek L. Rogers (15 pages)

Sale of Business – Prima Facie Motion – Related Employer – The Union filed a sale of business and related employer application based on the transfer of two "key men", particularly T – The Employers brought a motion to dismiss the Union's application on a *prima facie* basis – The Board acknowledged the Union's *prima facie* burden was not significant given the type of application and the corresponding reverse onus placed on Employers to provide all relevant information – The Board held the Union met this low burden; however, extensive contextual information was available to the Board, allowing it to release a decision on the merits – This

information included the following facts: (1) the initial Employer, A, was an established participant in the industry long before T joined the business; (2) A remained substantially unchanged after T's departure; (3) T brought only his expertise to his new Employer, not any substantial aspect of A's business; and (4), although A's profits decreased after T's departure, its revenues increased – Given this information, the Board concluded the application could not succeed simply by virtue of the transfer of one managerial employee to a pre-existing non-union company – Application dismissed on the merits

AECON CONSTRUCTION GROUP INC. (OPERATING AS AECON BUILDINGS); RE: THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: GOVAN BROWN INC.; RE: GOVAN BROWN HOLDINGS LIMITED; RE: GOVAN BROWN ENTERPRISES LIMITED; RE: GOVAN BROWN CONSTRUCTORS INC.; RE: GOVAN BROWN & ASSOCIATES LIMITED; RE: GOVAN BROWN MANAGEMENT INC.; OLRB Board No. 1926-14-R; Dated January 6, 2016, Panel: Eli A. Gedalof (15 pages)

Employment Standards – Brock sought review of an order requiring it to pay public holiday pay to its employee during the winter months – Brock argued it was in the landscaping business and therefore exempt from the holiday pay requirements – The Board held the employer's operations had a shifting business purpose: while for the balance of the year it engaged in gardening and landscaping, during the winter months it used its employees for snow removal and was thus obliged to pay holiday pay for Christmas, Boxing Day, New Year's Day and Family Day – Application dismissed

BROCK PROPERTY MAINTENANCE INC.; RE: BRIAN COLLINS; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 2727-14-ES; Dated January 25, 2016; Panel: Roslyn McGilvery (12 pages)

Bargaining Rights – Jurisdictional Dispute – Sale of Business – Voluntary Recognition – The IBEW challenged the assignment of electrical maintenance work at two mental health facilities by Honeywell to OPSEU members pursuant to a collective agreement arising from a 2013 VRA – OPSEU asserted its bargaining rights with Honeywell actually dated back to 2011 when the

original health care provider entered into an agreement with Project Co to provide, among other things, the work in dispute – In this agreement, Project Co agreed to stand in the place of the health care provider for the purpose of all outstanding collective agreements, and subsequently entered into its own collective agreements with OPSEU – Project Co then entered into a service contract with Honeywell under these same terms – OPSEU argued this agreement constituted a sale of business under section 69 of the Act – The Board found most factors in the jurisdictional dispute (including area practice, job security, economy and efficiency, and employer practice) supported the assignment of the maintenance work to OPSEU – The IBEW asserted the collective agreement between Honeywell and OPSEU was unlawful pursuant to section 73 – Specifically, the IBEW argued OPSEU did not obtain bargaining rights through a sale of business in 2011; rather, it attempted to obtain bargaining rights in 2013, at which time Honeywell was already bound to a collective agreement for maintenance electricians with the IBEW – The Board determined it had the ability in the midst of a jurisdictional dispute to determine issues under both sections 69 and 73 of the Act if they were relevant to the matter at hand and if the affected parties received proper notice of the issue and had an opportunity to respond – Further, the Board held that on the face of the materials before it, OPSEU and Honeywell had established a *prima facie* basis for their claim that a sale of business had occurred in 2011 – The Board stressed it was not making a finding such a sale took place; rather, it simply stated that in the context of the jurisdictional dispute, OPSEU and Honeywell had established a sufficient basis upon which the Board could conclude they had a valid and subsisting collective agreement at that time – The Board found the IBEW failed to put forward sufficient materials to cause the Board to question the legality of the Honeywell/OPSEU collective agreement – Therefore, the collective agreement factor was neutral, leaving all other factors in favour of upholding the work assignment to OPSEU – Application dismissed

HONEYWELL LIMITED; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 120; OLRB File No. 0132-15-JD & 0353-15-JD; Dated January 18, 2016; Panel: Eli A. Gedalof (13 pages)

Employment Standards – Sale of Business – Serpa applied for review of an order for termination and severance pay in favour of H – Serpa had informed its employees that its motorcycle division was closing in a month, the division was being transferred to a separate company (Ferri), and an offer of employment from Ferri would be forthcoming – Around the end of the month, Serpa informed H the closing was pushed back another month – H did not return to work after the initial month ended – Serpa argued H was never terminated; instead, his employment was continued with Ferri, a successor employer whose workforce H joined 4.5 months later – The Board disagreed, holding there was no evidence that anything was sold by Serpa to Ferri and, on this basis alone, the argument must fail – In the alternative, Serpa argued H had refused to show up to work or had resigned after the initial month ended – The Board also disagreed with this argument, holding that once an employer gives notice of a lay-off without a date of return, an employee is entitled to consider his or her employment at an end – The Board also noted that as the decision-maker, Serpa was in the advantageous position of deciding the date to end H's employment; therefore, once Serpa made the decision, it could not unilaterally change the date – Application dismissed

SERPA AUTOMOBILE (2012) CORPORATION O/A SERPA BMW; RE: JOHN HARE; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 0668-15-ES; Dated January 28, 2016; Panel: Matthew R. Wilson (8 pages)

Sale of Business – Related Employer – The parties agreed a sale of business occurred in 2004, resulting in three companies carrying on related activities and becoming a single employer within the meaning of the Act – However, the companies were permitted to continue to operate separately after 2004, despite the fact only one was bound to the Union – In 2008, the companies amalgamated – The Union argued this amalgamation resulted in a “second sale” of business because, unlike when businesses are found to be related employers, the Board has no discretion to withhold relief to the Union when a sale of business has occurred – The Board held it was not prepared at this point in the proceeding to conclude there could not have been a second sale of business in 2008 – Although no businesses were purchased or acquired at that time, it cannot be said that nothing changed, as a newly incorporated entity that did not previously exist became operative – Matter continues

TISI CANADA INC.; RE: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 530; RE: GLOBAL HEAT (1998) INC.; RE: WEST-NET SITE SERVICES INC.; OLRB file No. 1573-13-R; Dated January 7, 2016; Panel: Bernard Fishbein (12 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
Qingrong Qiu Divisional Court No. 669/15	2714-13-ES	Pending
Airside Security Access Inc. Divisional Court No. 670/15	1496-15-ES	Pending
Cotton Inc. Divisional Court No. 554/15	3254-13-U 3255-13-R	April 21, 2016
Kognitive Marketing Inc. Divisional Court No. 51/15 (London)	0621-14-ES	Pending
W.H.D. Acoustics Inc. Divisional Court No. 52/15 (London)	3151-14-G 3716-14-R	Pending
IBEW Electrical Power Council of Ontario (Crossby Dewar Inc.) Divisional Court No. 501/15	1697-11-G 1698-11-G	Pending
Labourers' International Union of North America, Local 1059 (McKay-Cocker) Divisional Court No. 384/15	0883-14-R	Pending
Universal Workers Union, Labourers' International Union of North America, Local 183 (Maystar) Divisional Court No. 368-15	1938-12-R	Pending
LBM Construction Specialties Inc. Divisional Court No. 353/15	0121-14-R	March 17, 2016
EMT Contractor Division Inc Divisional Court No. 32-15 (London)	3514-13-R	Pending
Carlene Bailey Divisional Court No. 173/15	0480-13-U	Pending
Valoggia Linguistique Divisional Court No. 15-2096 (Ottawa)	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No. 49/15	0229-13-R	January 26, 2016 Heard, Reserved
Royal Ottawa Hospital Divisional Court No. 14-62782 (Ottawa)	2461-14-IO	Pending
Dean Warren Divisional Court No. M-45870	2336-13-U	Allowed, ER seeking leave to CA
Donald A. Williams Divisional Court No. 327/14	1129-13-U	February 18, 2016
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Dismissed, Seeking leave to CA