

# *H*ighlights

Ontario Labour Relations Board

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## SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in May of this year. These decisions will appear in the May/June 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](http://www.canlii.org).

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**Lock-Out – Picketing – Prima Facie Motion – Strike – Unfair Labour Practice** – The Carpenters, Local 1030 filed an application alleging LIUNA Local 183, Garden Homes, Leblon Carpentry, Lido Carpentry and Yorkwood Homes violated, *inter alia*, sections 70, 72, 76 and 83 – The Carpenters also alleged the responding parties engaged in an unlawful strike and/or lock-out and engaged in activity which they knew or ought to have known would cause such events – Local 183 made a preliminary motion that the application failed to make out a *prima facie* case for any of the alleged violations of the Act or for the relief sought and that the Board was without jurisdiction to order the requested relief – The Board decided the motion in favour of Local 183 – The Board considered the “heart of Local 1030’s case”, the allegation that Local 183 “threatened, intimidated and assaulted Local 1030 workers” with the intention of causing them to engage in an unlawful strike and to compel them not to exercise their rights under the Act – The Board found that what had taken place was mob activity, not picketing, to compel workers not to work for fear of violence – The Board found Local 1030 members did not act in concert or collectively and did not engage in an unlawful strike – Local 1030

members left work because they were afraid for their health and safety, thus the Board determined they were not engaged in an unlawful strike – Although the act of workers collectively leaving work for health or safety reasons may be a “strike” within the meaning of the Act, the Board stated this would not be an unlawful one, as workers have a right, even collectively, to refuse unsafe work – The Board’s reasoning turned on the analysis of what Local 183 was attempting to compel Local 1030 members to do, not what Local 1030 members did – The Board found Local 183 had not engaged in the alleged activities with the intent of compelling or encouraging employers to suspend work for the purpose of punishing Local 1030 members for exercising rights under the Act or to change terms and conditions of their employment – The Board dismissed all other allegations against all responding parties – The Board also stated that since there is no right to work in the Act and that the Board has no statutory authority to regulate picketing, the place to address these circumstances is before the courts and the police – Application dismissed

**GARDEN HOMES; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1030; RE: LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: LEBLON CARPENTRY; RE: LIDO CARPENTRY; RE: YORKWOOD HOMES; OLRB File No. 0409-16-U; Dated May 18, 2016; Panel: Brian McLean (30 pages)**

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**Conflict of Interest – Duty of Fair Representation – Practice and Procedure** – In this duty of fair representation complaint, the

Board was asked to determine whether professional ethics required the removal of the Union's counsel of record from this matter – The Applicant asserted that it is improper for a member of a law firm to continue to be counsel of record if there was a “real likelihood” a member of the same law firm may be a witness in the same proceeding – The Union asserted the removal of the law firm as solicitors of record would be impractical, costly and interfere with the unique relationship unions have developed with their counsel in the context of labour relations – In reply, the Applicant alleged that the Board's failure to remove the law firm would bring the administration of justice into disrepute – The Board followed the ruling in *Essa Township v Guergis* where the court held it should permit the removal of solicitors from the record in “only the clearest cases” and that the approach applied should be a “flexible approach and consider each case on its own merits” when assessing the variety of factors listed – The Board found this was not a clear case and that the factors as set out in *Essa Township* did not support the removal of counsel – Specifically, the Board found there was little likelihood of a real conflict of interest, there was no indication the Applicant would subpoena the partner as a witness, the solicitor-client relationship was longstanding and the firm had no relationship to the Applicant other than that which arose from his membership in the bargaining unit – Motion dismissed, matter continues

**GARRY CUNNINGHAM; RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4400; OLRB Board No. 0878-15-U; Dated May 16, 2016, Panel: Thomas Kuttner, Q.C. (13 pages)**

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**Employment Standards** – The employer sought review of an ESO's determination that an employee on long-term disability is entitled to regular wages during a statutory notice of termination period, even though the employee was unavailable for work and unable to earn wages during the period in question – The employer sought to rely on one line of arbitral authority that denied employees on leave their statutory payments – The Board accepted the rationale articulated in the Ministry of Labour's Policy and Interpretation Manual, and an opposing line of arbitral jurisprudence which affirms entitlement to statutory payment in lieu of notice for employees absent from work on disability or other long-term leaves – The Board held that a plain reading of the statutory language contemplates payment of regular wages for a regular work week irrespective of time worked; such an interpretation eliminates

the possibility of discrimination against employees on disability or other long-term leaves of absence – Application dismissed

**LOEB PACKAGING LTD.; RE: JOHANNE LACROIX; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 1098-15-ES; Dated May 26, 2016; Panel: Caroline Rowan (15 pages)**

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**Employment Standards** – The Board ruled that there is no time restriction on allegations of reprisal under the ESA, and the one-year limitation for wage claims (as it existed at the time) had no application to claims for reinstatement or compensation – The Board found the date of alleged termination was unclear, casting doubt on the employer's assertion that a decision to terminate the employee was made at a certain time; the employee was discharged after he sought enforcement of the ESA; and the reasons given for the termination appeared to be after the fact justifications, and in any event they were tainted by improper motive – Application allowed in part: claim for wages denied as untimely; issue of remedy for the reprisal violation remitted to the parties for written submissions

**SUISHA GARDENS LIMITED/LES JARDINS SUISHA LIMITEE; RE: UTTAM THAPA; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB file No. 0592-15-ES; Dated May 11, 2016; Panel: Paula Turtle (15 pages)**

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**Construction Industry – Employee – Status – Termination** – The Board ruled on the threshold issue of whether the Applicant had standing as an employee to bring an application to terminate bargaining rights – The Applicant was found to be a managerial employee under section 1(3)(b) of the Act – Although he was the sole “employee” in the company, he was also the owner and operator as well as the director and president of the company, and the person who signed the voluntary recognition agreement with the union – In addition, the Board found that while under the collective agreement an owner operator was an employee for a limited purpose, he was not an employee in the bargaining unit for the purpose of the recognition clause – Application dismissed under section 63(2) of the Act – Applicant was a managerial employee and did not have status to bring application for termination – Application also dismissed under section 63(16) of the Act for employer support

**THERMAL PROCESS SYSTEMS INC.; RE: DAVE FOX; RE: U.A. LOCAL 787 REFRIGERATION WORKERS OF ONTARIO UNITED ASSOCIATION; OLRB File No. 0250-16-R; Dated May 17, 2016; Panel: Eli A. Gedalof (9 pages)**

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**Interim Relief – Unfair Labour Practice** – The ATU filed an application for interim relief pending the disposition of its section 96 application, alleging the TTC discriminated against its members, sought to restrain employees right to union representation, interfered with its administration and its representation of its members – The TTC argued it was trying to “enforce its management rights to investigate and if warranted discipline employees for serious misconduct amounting to fraud on TTC’s benefits plans” – The main issue before the Board was whether the Applicant was entitled to interim relief regarding the TTC’s refusals to tell the Applicant who it planned to interview, the specific allegations against the individual and the information sought from the interview before the interview was underway – In determining whether to grant an order for interim relief, the Board applied the test set out in *Wilson* and considered three factors: (1) whether there is a serious issue; (2) whether there would be irreparable harm to the applicant if relief is not granted; and (3) where the balance of labour relations harm and the public interest lies – The Board found the application failed on the second branch of the test, since the grievance and arbitration processes are available to remedy any procedural or substantive wrongs done, thus no irreparable harm could be established – The Board also found the Applicant had failed to adduce any evidence to show that earlier disclosure of such information would have enabled the Applicant to more effectively represent employees in the fact-finding interviews – The Board dismissed the application for interim relief but ordered the TTC to amend a preamble read to the Applicant’s members, so that it clearly communicated that the Applicant and/or the employee have the right to provide information, answers, documents and corrections after the fact-finding interview and after the Applicant has conferred with the employee – Application for interim relief dismissed

**TORONTO TRANSIT COMMISSION; RE: AMALGAMATED TRANSIT UNION, LOCAL 113; OLRB file No. 0011-16-IO; Dated May 20, 2016; Panel: Derek L. Rogers (19 pages)**

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**Duty to Bargain in Good Faith – Unfair Labour Practice** – Trillium Lakeland District School Board alleged the OSSTF failed to bargain in good faith by bargaining illegal proposals to impasse – The OSSTF countered the impugned proposals were not unlawful on their face, were consistent with the statutory scheme and not unlawful as per the Board’s jurisprudence – The OSSTF claimed that the Board’s use of the term “illegal” signifies proposals contrary to the regime of collective bargaining in Ontario, not that they are contrary to any other legislation beyond its jurisdiction – The Board rejected this argument and determined the question it must ask is whether “the only reasonable interpretation of the proposal [is] such that it is necessarily in conflict with the statutory scheme in question?” – The Board answered this question in the negative, finding none of the impugned proposals were necessarily inconsistent with the applicable statutory scheme – On this basis, the Board declined to determine the question of whether the proposals were bargained to impasse, or whether there was a labour relations purpose for granting the Applicant’s requested remedies – Application dismissed

**TRILLIUM LAKELANDS DISTRICT SCHOOL BOARD; RE: ONTARIO SECONDARY SCHOOL TEACHERS’ FEDERATION; RE: ONTARIO SECONDARY SCHOOL TEACHERS’ FEDERATION, DISTRICT 15 - TRILLIUM LAKELANDS; OLRB file No. 0118-16-U; Dated May 20, 2016; Panel: Patrick Kelly (37 pages)**

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## **COURT PROCEEDINGS**

**Judicial Review – Practice and Procedure – Unfair Labour Practice** – The employer brought an application for judicial review of a decision of the Board certifying the respondent union, as well as a decision of the Board refusing reconsideration of the certification – The Board ordered the remedial certification and reinstated an employee, finding that the employer failed to discharge its burden of establishing that it had terminated the employee for a reason unrelated to his involvement in the Union’s organizing drive – The employer argued the decision was unreasonable and unfair for three reasons: (1) the Board failed to set out a “logical pathway between the Board’s findings and the evidence adduced”, (2) the Board denied it the opportunity to adduce further evidence regarding the employee’s performance, critical to the determination of anti-union animus, and (3) the Board’s findings of credibility in assessing evidence of witnesses and failure to

weigh and consider its key evidence – The Court held that the Board’s decision fell within a range of reasonable outcomes which the Board was entitled to make and that it did not breach the rules of procedural fairness – The Court found the Board’s decision refusing to allow the Applicant to adduce new evidence at the hearing was done in accordance with the Board’s *Rules of Procedure*, that it had given the Applicant many opportunities to provide material, that the Applicant had provided no exceptional reason for failing to adduce the evidence sooner and that it had no legitimate expectation that the Board should allow it to do so – The Court also concluded it should not re-weigh testimony and credibility findings, since the Board made reasonable findings of fact and that the Board’s decision “demonstrate[d] a logical chain of reasoning ... sufficient to justify [its] conclusion” – Application dismissed

**COTTON INC.;** RE: LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837; OLRB File No. 3254-13-U & 3255-13-R; (Court File No. 554/15); Dated: May 30, 2016; Panel: A.C.J.S.C. Marrocco, R.S.J. Morawetz and Thornburn, JJ. (18 pages)

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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, 7<sup>th</sup> Floor, 505 University Avenue, Toronto.

## Pending Court Proceedings

| Case name & Court File No.                                                                                                          | Board File No.                         | Status                    |
|-------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|---------------------------|
| <b>Ajay Misra</b><br>Divisional Court No. 176/16                                                                                    | 1849-15-U                              | Pending                   |
| <b>Delores Grey</b><br>Divisional Court No. CV-16-1127-00 <b>(Brampton)</b>                                                         | 0317-15-U                              | Pending                   |
| <b>Labourers' International Union of North America, Local 183 (Alliance Site Construction Ltd.)</b><br>Divisional Court No. 133/16  | 3192-14-JD                             | Pending                   |
| <b>Public Service Alliance of Canada</b><br>Divisional Court No. 115/16                                                             | 0119-13-R                              | Pending                   |
| <b>R. J. Potomski</b><br>Divisional Court No. 12/16 <b>(London)</b>                                                                 | 1615-15-UR<br>2437-15-UR<br>2466-15-UR | Week of November 21, 2016 |
| <b>Serpa Automobile (2012) Corporation (o/a Serpa BMW)</b><br>Divisional Court No. 095-16                                           | 0668-15-ES                             | Pending                   |
| <b>David Houle</b><br>Divisional Court No. 1021-16 <b>(Sudbury)</b>                                                                 | 0292-15-U                              | Pending                   |
| <b>Qingrong Qiu</b><br>Divisional Court No. 669/15                                                                                  | 2714-13-ES                             | Pending                   |
| <b>Airside Security Access Inc.</b><br>Divisional Court No. 670/15                                                                  | 1496-15-ES                             | Pending                   |
| <b>Cotton Inc.</b><br>Divisional Court No. 554/15                                                                                   | 3254-13-U<br>3255-13-R                 | Dismissed<br>May 30, 2016 |
| <b>Kognitive Marketing Inc.</b><br>Divisional Court No. 51/15 <b>(London)</b>                                                       | 0621-14-ES                             | Pending                   |
| <b>W.H.D. Acoustics Inc.</b><br>Divisional Court No. 52/15 <b>(London)</b>                                                          | 3151-14-G<br>3716-14-R                 | Pending                   |
| <b>IBEW Electrical Power Council of Ontario (Crossby Dewar Inc.)</b><br>Divisional Court No. 501/15                                 | 1697-11-G<br>1698-11-G                 | Pending                   |
| <b>Labourers' International Union of North America, Local 1059 (McKay-Cocker)</b><br>Divisional Court No. 384/15                    | 0883-14-R                              | June 17, 2016             |
| <b>Universal Workers Union, Labourers' International Union of North America, Local 183 (Maystar)</b><br>Divisional Court No. 368-15 | 1938-12-R                              | September 12, 2016        |
| <b>Carlene Bailey</b><br>Divisional Court No. 173/15                                                                                | 0480-13-U                              | Pending                   |

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| <b>Valoggia Linguistique</b><br>Divisional Court No. 15-2096<br><b>(Ottawa)</b>       | 3205-13-ES             | Pending                                                                     |
| <b>Toran Carpentry Inc.</b><br>Divisional Court No. 49/15; Court of Appeal No. M46308 | 0229-13-R              | Dismissed March 8, 2016, LIUNA seeking leave to CA                          |
| <b>Dean Warren</b><br>Divisional Court No. M-45870                                    | 2336-13-U              | Allowed<br>Leave to CA dismissed March 30, 2016<br>NHL seeking leave to SCC |
| <b>Godfred Kwaku Hiamey</b><br>Divisional Court No. 345/13; 346/13                    | 2906-10-U<br>3568-10-U | Request for extension to file leave application dismissed by CA             |