

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Leonard Marvy, Solicitor
Aaron Hart, Solicitor

January 2018

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of last 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.

Bar – Certification – Construction Industry – Practice and Procedure – Two preliminary motions raised by the employer – The union conceded the employer’s s. 8.1 challenge to the first application for certification and requested that the application be dismissed pursuant to s. 8.1(5)7 of the Act – Approximately half an hour after the Board’s decision to dismiss the first application for certification, the applicant filed a second application for certification – The employer argued that the second application should be barred by virtue of section 7(10) – Alternatively, the employer argued the Board should exercise its discretion and either impose a discretionary bar under 111(2)(k) or refuse to consider the application under 111(3)(c) – The Board declined to treat the applicant’s concession under section 8.1 as a withdrawal and impose a mandatory bar – There is no statutory basis to characterize an

otherwise legitimate concession as a withdrawal – Parties can and do concede section 8.1 challenges for a variety of reasons, many of them strategic or tactical – It is not a function of the Board to inquire into the “real reason” as to why the union conceded – Section 111(3)(c) applies where a second application for certification is filed before a final decision on the first application for certification has been issued by the Board – In this case, the second application was filed approximately half an hour after the first application was dismissed, therefore, section 111(3)(c) is not applicable – A discretionary bar under section 111(2)(k) may be appropriate if the union has filed successive unsuccessful applications, or if the union has acted in bad faith or engaged in an abuse of process – Nothing in the applicant’s conduct in this case would justify a finding of bad faith conduct or an abuse of process – There are no grounds to impose a discretionary bar under section 111(2)(k) – Preliminary motions denied – Matter continues

1198070 ONTARIO INC. O/A CHAMPLAIN MANOR RETIREMENT RESIDENCE; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No. 1396-17-R; Dated December 5, 2017; Panel: Adam Beatty (12 pages)

Bargaining unit – Certification – In an earlier decision the Board found that shift supervisors did not exercise managerial functions pursuant to s. 1(3)(b) and accordingly were employees – The issue before the Board was the appropriateness of the union’s proposed bargaining unit, which included team leaders and team members, but excluded shift supervisors – The facts showed that shift supervisors did the same work as the team leaders and members at least 90% of the time – Although the remaining work was “supervisory” the Board had already found this did not constitute managerial functions – The Board found that excluding shift supervisors would create serious labour relations harm: shift supervisors are functionally integrated with team leaders and members; given their small number (5), they would be left “high and dry” if excluded; assuming they could bargain collectively, this would create the possibility of two bargaining units in a relatively small workforce; fragmentation and its undesirable outcomes would be inevitable; and proposed unit also contrary to the Board’s aversion to classification-based bargaining units – The Board found the proposed unit was simply not conducive to sound collective bargaining – Direction to count ballots

891110 ONTARIO INC. C.O.B. AS TIM HORTON’S STORE #2209; RE: SEAFARERS’ ENTERTAINMENT AND ALLIED TRADE UNION; OLRB File No. 3358-15-R; Dated December 15, 2017; Panel: Roslyn McGilvery, Carol Phillips, and William Cook (16 pages)

Certification – Certification Where Act Contravened – Remedies – Unfair Labour Practice – The union applied for certification and for relief under s. 11 based on the termination of one employee (“H”), an inside organizer, and the layoff of three other employees (union supporters) during the organizing campaign – On review of the facts surrounding the termination of H the Board found the evidence concerning the employer’s reason for the termination (a nail gun incident and

performance matters) to be very weak, especially in light of the termination having occurred directly after H was handing out cards and stickers to other employees – The Board also found the employer’s explanation for the layoffs was not credible for several reasons (no evidence the layoffs had been discussed with employees; unusual for layoffs to occur on a Sunday; documents supported that work continued for several more weeks; all three employees were competent framers; timing of layoffs occurred directly after knowledge of organizing) – The Board reviewed its jurisprudence setting out the serious consequences that flow from the termination of a union’s inside organizer where employees are aware of the termination, and found that given the threat to job security, the true wishes of employees would not be reflected in a representation vote – Remedial certification granted

AKUBILT CONSTRUCTION LTD.; CARPENTERS DISTRICT COUNCIL OF ONTARIO; OLRB File No. 0585-16-U; Dated December 21, 2017; Panel: Gita Anand, R. Martin and W. Nicholls (29 pages)

Health and Safety – Practice and Procedure – Reprisal – After the complainant filed his first reprisal complaint under the OHSA, the employer served a statement of claim in a civil action alleging that the complainant had taken confidential information following his employment termination – In his second reprisal complaint the complainant alleged that the attempt to serve, and the service of, a statement of claim in a civil matter constituted a breach of s. 50 of the *Occupational Health and Safety Act* – The employer asserted that the second application must be dismissed on the basis of absolute privilege – The Board carefully reviewed the jurisprudence on absolute privilege and found that the jurisprudence made it clear that the doctrine extends to words used by litigants in legal proceedings and that this applied not only to pleadings, but also to letters, such as those seeking consent to accept service from the complainant’s

counsel – Second application dismissed, the other to proceed as scheduled

DELTRO ELECTRIC LTD.; RE: LAWRENCE HILL; OLRB File No. 0041-17-UR; Dated December 18, 2017; Panel: Roslyn McGilvery (7 pages)

Duty of Fair Representation – Intimidation and Coercion – Reprisal – Unfair Labour Practice –

Applicant alleged that CUPE retaliated against her contrary to s. 87(2) of the Act for filing a DFR complaint – CUPE’s President at the time (“A”) took deep personal offence to the allegations made in the DFR complaint and decided to bring internal charges against the applicant – During a meeting of the union executive, a decision was made by the executive to schedule a Special Meeting of the membership to announce A’s charges and set process in motion for establishment of a trial board – The document containing A’s charges against the applicant was signed using her title as CUPE President – Without protest by the union executive, A presided at the Special Meeting and unequivocally established the link between the DFR complaint, of which the membership had no knowledge of, and A’s charges against the applicant – The trial panel convened twice before A withdrew the complaint which was not communicated officially to the union’s membership – Trade union leadership ought to think long and hard before using its official machinery to facilitate a union officer’s agenda to rectify perceived personal insults and slurs contained in a complaint brought before the Board – Individuals have the right under the Act to challenge their trade unions on a number of fronts so long as they do not abuse the Board’s process, and are not driven by frivolous and vexatious motives, they should not feel constrained in the exercise of those rights – When it comes to a contest between the protection of employees from unlawful reprisals and the exercise of rights of members under a trade union’s constitution to pursue charges against one another, the former prevails – A usurped the Board’s function by initiating an

internal process to attack the offending allegations in the DFR complaint, and the local executive allowed it – The decision to file charges, proceed to a Special Meeting, and establish a trial board was tainted by improper motivation – Charges against the applicant constituted intimidation of, or the imposition of a penalty against, the applicant because of her participation in a proceeding before the Board – The Board declares the union violated subsection 87(2) of the Act

THE CORPORATION OF THE COUNTY OF LAMBTON; RE: VERONICA MCDONALD AND FAMILY VISITORS EMPLOYED BY THE COUNTY OF LAMBTON, AND MEMBERS OF CUPE LOCAL 1291; RE: CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB File No. 3083-11-U; Dated December 4, 2017; Panel: Patrick Kelly (14 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
Highcastle Homes Inc. Divisional Court No. 7/18	3196-15-R 3282-15-U	Pending
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	Pending
Sheet Metal Workers' International Association Divisional Court No. 613/17	1536-16-R	Pending
Dennis McCool Divisional Court No. 566/17	0402-16-U	Pending
Cecil Cooray Divisional Court No. 324/16	1594-15-U	June 20, 2018
S. & T. Electrical Contractors Limited Divisional Court No. 562/17	1598-14-U 1806-14-MR	Pending
Reuben Gooden Divisional Court No. 556/17	1113-16-U 1114-16-U 1213-17-U	March 14, 2018
Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	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
Kevin Mackay Divisional Court No. 466/17	2972-16-U	Pending
Across Canada Divisional Court No. 244/17	3673-14-R	April 12, 2018
LIUNA (Pomerleau Inc.) Divisional Court No. 257/17	3601-12-JD	Pending
TTC Divisional Court No. 262/17	1995-16-HS	January 25, 2018

(January 2018)

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
Women’s College Hospital Divisional Court No. 24/17		0830–15–M	Pending
Innovative Civil Constructors Divisional Court No. 611/16		0142–16–R	Pending
Yuchao Ma Divisional Court No. 543/16		2438–15–U	Pending
Byeongheon Lee Court of Appeal No. M48402		0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403		0015-15-U	Pending
Carpenters (Riverside) Court of Appeal No. M48481		0630–16–R	Pending
R. J. Potomski Divisional Court No. 12/16	(London)	1615–15–UR 2437–15–UR 2466–15–UR	Pending
Serpa Automobile (2012) Corporation (o/a Serpa BMW) Divisional Court No. 110/16		0668–15–ES	February 13, 2018
David Houle Court of Appeal No. M48449		0292–15–U	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