

*H*IGHLIGHTS

Ontario Labour Relations Board

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NOTICE TO COMMUNITY

PLEASE TAKE NOTICE OF THE FOLLOWING CHANGES TO THE BOARD'S RULES OF PROCEDURE EFFECTIVE MAY 7, 2018.

New Rule 28.7 has been added

28.7 The argument portion of the brief shall not exceed twenty pages (ten pages for the reply brief) on 8½" by 11" paper, double-spaced, 12-point font. Leave of the Board to exceed this limit must be requested at least 10 days prior to the filing of the brief and may be granted only in exceptional circumstances. Unless leave has been granted, briefs that exceed the stipulated length will not be accepted.

Rule 41.1 has been amended, at paragraph "h" to incorporate two new applications (sections 20 and 20.1) under the *School Boards Collective Bargaining Act, 2014*

h. sections 20, 20.1, 25 and 28 of the *School Boards Collective Bargaining Act, 2014*

SCOPE NOTES

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

Collective Agreement – Related Employer – Sale of Business – Trade Union – In the course of a s. 69/1(4) application two threshold issues were decided by the Board: whether the intervening Association was entitled to trade union status and if so, whether the collective agreement, negotiated outside Ontario, between it and the employer, Maple Leaf, was a valid collective agreement in Ontario – First, the Board found the Association to be an organization of employees operating under a constitution whose purpose is the regulation of labour relations between its members and Maple Leaf – The Board also noted that the test for viability for trade union status concerns itself not with the quality or skill or experience of the organization but only with whether it has operational functionality in the sense that it has a basic structure and set of rules – The Board was satisfied with the Association's status as a trade union – Next, the Board noted that the collective agreement, negotiated in Manitoba, contained a scope clause which applied to all employees without geographic limitation, giving rise to a presumption that it does not apply in Ontario, unless the presumption can be overcome by showing that the agreement was intended to and/or had in fact been applied in Ontario – The evidence before the Board showed no work undertaken in Ontario since 2006, but in the ten year period before that, Maple Leaf undertook 25 projects in Ontario (seven worth over \$100,000 and one close to \$4,000,000) – After reviewing the case law the Board found that once there is evidence to challenge the presumption, one should also consider whether that evidence together with the open ended recognition clause, supports the conclusion that it was the intention of the parties to include Ontario in the scope of the agreement – In addition to other matters, the Board found, most

importantly, that the explicit terms of the collective agreement in article 13.04 [\$1 per hour premium for employees working out-of-province] together with the practice of Maple Leaf and the Association, clearly demonstrated an intention that the Association has bargaining rights for all employees of Maple Leaf where work is performed outside Manitoba – Matter continues

CAMARO ENTERPRISES LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE: MAPLE LEAF CONSTRUCTION LTD.; OLRB File No. 0234-17-R; Dated April 20, 2018; Panel: C. Michael Mitchell (14 pages)

Related Employer – Termination – Union referred three grievances to the Board under section 133 of the *Labour Relations Act, 1995* against Ontario Power Generation Inc. (“OPG”), Aecon Industrial, a Division of Aecon Construction Group Inc. (“Aecon”), and Crossby Dewar Projects Inc. (“Crossby Dewar”) relating to the termination and revocation of security clearances of two grievors after both were found with marijuana in their possession – Union also filed applications under subsection 1(4) and section 69 of the Act and two unfair labour practice complaints against OPG – The grievances alleged violation of Article 30.07 of the general collective agreement between the EPSCA and LIUNA, OPDC to which all parties were bound – OPG, as the owner and operator of the sites, claimed it was not the employer of the two grievors and asked for the issue to be dealt with on a preliminary basis since the Union had no right to grieve against it – The Board found that the Union’s right to grieve is founded in the relevant collective agreement which it has negotiated – The ordinary meaning of Article 30.07 (which was amended by negotiation effective in May 2015) indicates that only the grievor’s employer can be grieved against for a termination – The Board refused to modify or interpret the collective agreement provision to apply to OPG because the Union was unsatisfied with the terms it negotiated – The Board found the Union was trying to use the related or successor employer applications to extend its bargaining rights to have certain provisions of the collective agreement it negotiated to apply to OPG – In response to the Union’s claim that OPG and Aecon, and OPG and Crossby Dewar are joint employers under common law, the Board held it is a creature of statute and does not have jurisdiction to deviate from the provisions of the Act – The Union’s claims under the *Canadian Charter of Rights and Freedoms*, and its unfair labour practice claims were dependant on finding OPG was an employer

– Grievance referrals against Aecon and Crossby Dewar scheduled to be heard – All other applications dismissed

CROSSBY-DEWAR PROJECTS INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506; RE: ONTARIO POWER GENERATION INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: ONTARIO POWER GENERATION; RE: AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC.; RE: ANDY FORSYTH; OLRB File No. 3139-16-G, 3146-16-G, 0154-17-G, 0486-17-R, 0487-17-U, 0647-17-R & 0648-17-U; Dated April 9, 2018; Panel: Yvon Seveny (40 pages)

Bargaining Rights – Collective Agreement – Construction Industry – Termination – Timeliness – Applicant filed an application for termination of bargaining rights under section 63 or 132 of the *Labour Relations Act, 1995* – Local 27 argued the termination application was untimely pursuant to section 67(3) of the Act because it was on strike when the application was filed – Local 27 filed a related unfair labour practice complaint against the employer – Section 67(1)(b) of the Act states where a trade union has not made a collective agreement within one year of certification and a conciliation officer or mediator has been appointed, a termination application cannot be made until 30 days has elapsed after a No Board Report has been released to the parties – Under section 122(2)(a) if a No Board Report was sent by mail, it is deemed to have been released on the second day after the day on which it was mailed – The No Board Report was dated May 1, 2017 and delivered by mail, therefore it was released on May 3, 2017 – The Board agreed with Local 27, “30 days have elapsed after” the release of the No Board Report results in the time count ending the day after 30 days have passed (*i.e.* on the 31st day) – Since the termination application was filed on June 2, 2017, 30 days had not elapsed after the No Board Report was released and the Board determined the application was untimely under section 67(1)(b) – Application dismissed

MANALCO CONTRACTING LTD.; RE: MARCO NOÉ; RE: CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0588-

17-R & 0633-17-U; Dated April 3, 2018, Panel: John D. Lewis (9 pages)

Application for Employee List – Practice and Procedure – Union applied for a List of employees under s. 6.1 estimating there were 200 employees in the bargaining unit and the employer's declaration stated there were 280 – The Board made it clear that s. 6.1(8) does not require the Board to hold a hearing or to consult with the parties in determining either the estimated number of individuals in the unit or in determining the percentage of individuals who appear to be members of the union – In addressing the large discrepancy in numbers the Board noted that the Act requires a statutory declaration from the employer, but not from the union, which makes sense given that the union would be unlikely to know with any certainty the number of employees in the bargaining unit – The Board also noted that these applications should be dealt with expeditiously – In the circumstances of the case before it, the Board preferred the employer's number – In doing the Board did not merely accept the employer's list as filed, but carefully reviewed it – For the number of individuals conceded by the employer not to be at work on the date of application for which there was no expected date of return (and without making any specific determination about their status in the bargaining unit), the Board gave the union the maximum benefit of doubt by accordingly reducing the estimate – Finally, the Board noted that the Act does not appear to stipulate any consequences from a dismissal for not demonstrating more than 20 percent – Application dismissed

PARAMED HOME HEALTH OAKVILLE BRANCH; RE: SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA; OLRB File No. 0112-18-R; Dated April 16, 2018; Panel: Bernard Fishbein (4 pages)

Related Employer – Sale of Business – Five days after the union was certified as the bargaining agent of a bargaining unit of employees of the employer, a Receiver was appointed by the court to operate, manage and carry on the business of the employer – The union served notice to bargain on the Receiver which refused to negotiate a collective agreement – The union brought a sale of business application seeking only a declaration that the Receiver was a successor employer, and by consent order the stay of proceedings was lifted allowing the union to bring the application – The issue in this case turned on whether s. 14.06(1.2) of the

Bankruptcy and Insolvency Act prohibited the Board, as the Receiver argued, from making a finding that it was a successor employer – The Board began by noting that it has the exclusive jurisdiction to make a successor employer declaration and that under *GMAC Commercial Credit Corp* explicit statutory language must be present to divest persons of the rights they otherwise enjoy under the law – The Board found s. 14.06(1.2) did not meet that standard and therefore did not preclude the Board from making the declaration for the following reasons: First, the Board found that bargaining rights granted to a trade union on certification cannot be considered a "liability...that is in respect of employees of the debtor" – The Board referred to the Court of Appeal's decision in *Romspen Investment Corp* where it reasoned that a successful certification and the ability to bargain collectively did not guarantee increased wages or other terms detrimental to creditors, that the impact of collective bargaining on a sale was purely speculative and that indefinite delay would be unduly prejudicial to both the union and employees – Second, the Board noted that had the intention of Parliament been to preclude a finding that a trustee was a successor employer the words "including one as a successor employer" would have no meaning – The Board concluded on this point that the intent of the wording "in respect of a liability, including one as a successor" was to clearly immunize the Receiver from certain liabilities in respect of the debtor's employees which might flow from a finding of successor employer, but that it does not preclude a finding that the Receiver was a successor employer – Finally, the Board noted that this immunization from liability only applies to the trustee/Receiver as a successor and not to an employer who may ultimately purchase the business from the trustee – Declaration made

ROSE OF SHARON (ONTARIO) COMMUNITY COB AS ROSE OF SHARON KOREAN LONG-TERM CARE HOME; RE: UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; RE: DELOITTE RESTRUCTURING INC.; RE: DELOITTE AND TOUCHE INC.; OLRB File No. 2986-16-R; Dated April 12, 2018, Panel: Robert W. Kitchen (16 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
Tomasz Turkiewicz Divisional Court No. 262/18	2374-17-R	Pending
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	Pending
Alicia R. Allen Divisional Court No. 199/18	0255-17-UR	Pending
Provincial Employers' Bargaining Agency - Labourers Divisional Court No. 141/18	2221-15-U	Pending
Trisect Construction Corporation Divisional Court No. 087/18	2553-15-R	Pending
Matrix North American Construction Canada Divisional Court No. 051/18	0056-16-JD	Pending
Brookfield Multiplex Ltd. Divisional Court No. 025/18	1368-15-R	Pending
Canada Bread Company, Limited Divisional Court No. 11/18	3729-14-R 3730-14-R 3731-14-R 3732-14-R 3733-14-R	Pending
Bricklayers (Prescott) Divisional Court No. 18/18	3440-14-U	Pending
Robert Daniel Laporte Divisional Court No. 037/18	2567-15-U	Pending
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	May 15, 2018

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Ramkey Construction Inc. Divisional Court No. 539/17	1269-15-R	June 7, 2018
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	May 9, 2018
LIUNA (Pomerleau Inc.) Divisional Court No. 257/17	3601-12-JD	Pending
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
Yuchao Ma Divisional Court No. 543/16	2438-15-U	October 4, 2018
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