



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1144-14-R**

Labourers' International Union of North America, Local 183, Applicant
v **Normac Kitchens Limited**, Responding Party v Group of
Employees, Intervenors.

BEFORE: Lee Shouldice, Vice-Chair

DECISION OF THE BOARD: October 8, 2014

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act. This application was filed with the Board on July 21, 2014.
2. In accordance with a decision of a differently constituted panel of the Board dated September 8, 2014, the parties exchanged and filed submissions with respect to requests made by the applicant and the responding party for production of certain documents. This decision contains the orders made by the Board for production of documents in this proceeding.
3. Subsection 111(2)(b) of the Act provides the Board with the authority to order pre-hearing production of documents from a party to a proceeding. The threshold for production of documents in hearings before the Board is that of arguable relevance. In *Maplehurst Correctional Complex*, [2003] OLRB Rep. March/April 242, the Board described that standard as follows, at page 245:

Whether documents are "arguably relevant" means, in my view, whether there might or could be some logical or rational relationship between the documents being sought and the issues in the proceeding. The party seeking to establish that documents are arguably relevant must meet a relatively low threshold.

Nevertheless, the Board will not order production of documents where the party seeking that production cannot establish that logical connection or is seeking production not to prove a case but to find out if there even is a case.

I have considered the production requests made by the parties with the above standard in mind.

(a) *The Applicant's Production Request*

4. I consider first the production request made by the applicant. In its decision dated September 8, 2014, the Board determined that the documents sought by the applicant contained in its counsel's letter dated August 20, 2014 ought to be produced for the three month period immediately preceding the application filing date. Accordingly, if it has not already done so, the responding party is directed to produce to the applicant the following documents for the three month period referred to above:

All documents not already produced, including but not limited to contracts, subcontracts, work orders, emails, text messages, notes, billing information, invoices, driver's logs, receipts, payroll records, log books, and any other records related to the work performed by the individuals in dispute for the responding party on the application filing date.

All documents, electronic or otherwise, relating to the responding party's contracting relationships with Xela, including but not limited to contracts, quotes, and any other documents related to all the work performed by Xela for the responding party.

All documents, electronic or otherwise, related to the remuneration of Kovalenko, Kolisnyk and Tsindelini, for all work that they have completed for the responding party. This includes, but is not limited to, all invoices, time sheets, scheduling, paystubs, and payroll records from the time these individuals worked for the responding party.

All documents relevant to the status of Gabriel Perez and Patricio Currasco, including but not limited to all records of communications, whether

by email or other form and including notes of conversations, log books, diaries, with respect to the scheduling, managing of projects of job sites, disciplining, hiring, firing, making recommendations, setting compensation or any other terms and conditions of employment. In addition, all documents related to communication between Gabriel Perez and Patricio Currasco and the responding party's customers, managerial employees and non-managerial employees that relate to the employment duties and functions of these two individuals working for the responding party.

These documents are to be produced to the applicant no later than December 12, 2014.

5. The applicant also seeks production of all documents and communications, electronic or otherwise, including text messages and emails, between the responding party and the five employee intervenors relating to this matter in any respect and, in particular, relating to their representation in these proceedings by their legal counsel, Mr. LeNoury. The applicant also seeks production of all documents and communications, electronic or otherwise, including text messages and emails, between the responding party and Mr. LeNoury relating to his representation of the five employees in these proceedings.

6. None of the documents sought by the applicant identified in the paragraph immediately above are arguably relevant to any live issue in this proceeding. At the Case Management Hearing held in this matter on September 3, 2014, the applicant challenged the right of the five individuals to intervene and sought production of the retainer that existed between those five individuals and Mr. LeNoury. The Board determined in its decision dated September 8, 2014 that the five employees were entitled to participate in this proceeding. It also dismissed the request for disclosure of information relating to the retainer of Mr. LeNoury.

7. With respect to the latter dismissal, the Board noted that the applicant had not made any allegations of impropriety, and that the role of the responding party in relation to the retention of Mr. LeNoury is neither material nor relevant for the purposes of an application for certification. The Board also noted that the scope of the retainer

enjoyed by Mr. LeNoury and the source of any funds utilized to pay him are presumed to be covered by solicitor-client privilege.

8. Nothing has changed since the decision of the Board dated September 8, 2014. The five individuals are still entitled as a matter of law to intervene in this proceeding, and to be represented by legal counsel when doing so. The applicant has not made any allegations of impropriety, and the same presumption of solicitor-client privilege still applies. The documents sought by the applicant are not arguably relevant to any live issue before the Board, and will not be ordered produced by the Board.

(b) The Responding Party's Production Request

9. I turn now to the production request made by the responding party. As will become evident, that request is somewhat more complicated than the request made by the applicant.

10. The applicant asserts in this proceeding that on the application filing date bargaining unit work was performed by 16 individuals at eight different sites. It identified those sites in its application. The responding party disagrees with the factual assertions made by the applicant. It filed a response in which it claims that on the application filing date it employed 29 persons in the bargaining unit sought by the applicant, and that those 29 people worked at 12 different sites. It too identified those sites in its pleading.

11. When the parties exchanged status submissions, an issue arose when the responding party identified four individuals as having worked at sites on the application filing date that were described differently than they had been described in the response it had filed three weeks earlier.

12. By way of example, the response names as a relevant site a project identified as "Conservatory Infinity", which the response states is located at 51 Lower Simcoe Street in Toronto. This is one of the sites not identified by the applicant in its application. When the parties exchanged submissions, the responding party indicated that two of the individuals it had placed on the Schedule "A" list had performed bargaining unit work at 19 Grand Trunk Crescent and 25 Lower Simcoe Street, in Toronto. The responding party states that these two individuals were working at the same Conservatory Infinity site that it had previously identified in its response.

13. The applicant, in its reply submissions, asserts that the names of the two individuals who worked at these locations ought to be struck from the Schedule "A" list. It states that the responding party is improperly attempting to add new active sites to its response, and that its position has been highly prejudiced by the addition of new sites at such a late date. In this regard, the applicant states that after receipt of the response from the responding party, one of its representatives visited 51 Lower Simcoe Street in an unsuccessful attempt to investigate the assertion made by the responding party that bargaining unit work had been carried out at that location on the application filing date.

14. Similar assertions are made by the applicant with respect to other sites which the responding party described somewhat differently in its written submissions than it had previously in its response. A Fernbrook Homes site identified by the applicant as being located at Dundas Street West and Millwood Avenue West in Oakville is referred to in the response as being located at 2579 Sixth Line, Oakville. In the written submissions subsequently filed with the Board, the responding party identifies the street location as 2450 Post Road, Oakville. A "Darcon, The World" site described by the applicant as being located at 7161 Yonge Street in Toronto is identified in the response as Darcon World "C", at 7161/7171 Yonge Street. Subsequently, the responding party identifies the street location at which work was performed as "the 7100 block of Yonge Street" in Markham. Finally, a site identified by the applicant as "Menkes, Gibson Square, 5180 Yonge Street, Toronto" was identified in the response as "Menkes Gibson Square, 5162 Yonge Street, Toronto" and subsequently by the responding party as "the Gibson Square development at 5170 Yonge Street in Toronto".

15. In reply to the position taken by the applicant, the responding party disputes that the applicant has been prejudiced by the different names it used to describe the work sites at which it asserts bargaining unit work was being performed on the application filing date. Briefly put, the responding party states that the projects that are the subject of the applicant's complaints are multiple-building construction sites that are well-known in the community for having a number of different street addresses. The responding party claims that representatives of the applicant knew of these different street addresses at all relevant times, and that the applicant's assertion that it has been highly prejudiced in the circumstances is, as a matter of fact, simply not true.

16. It is within this context that the documentary production issue arises. The responding party seeks to secure documents from the

applicant that will confirm that representatives of the applicant were aware at all times of the various street addresses affiliated with the projects in question. That knowledge, asserts the responding party, will undercut the assertion made by the applicant that it has been highly prejudiced in the circumstances.

17. The documents sought by the responding party are encompassed by the following production request:

(a) All documents, reports, notes, text messages, emails, logbooks, receipts and any other records relating to activities by Local 183, its employees and/or agents at or in relation to any of the above jobsites, whether or not such activity was in relation to this application;

(b) All records relating to work performed on the jobsites by any contractor or subcontractor in contractual relations with Local 183, regardless when, so long as those records identify the jobsite or jobsites specifically;

(c) All records with respect to any administration or business activities of Local 183 on the jobsites relating to any work performed on the sites, whether performed by Normac or any other entity;

(d) All union organizer notes in respect to this application or any other application for certification or displacement, whether or not filed, in relation to the jobsites;

(e) All pictures depicting any of the jobsites;

(f) All records showing knowledge of the existence and nature of the jobsites; and

(g) In respect of all documents noted above, where it is not apparent on the face of the document, particulars with respect to the document's creation, including the name of the person creating the document and the circumstances under which the document was created.

The relevant job sites referred to in the production order sought by the responding party are identified above.

18. In support of its position, the responding party states that by pleading severe prejudice in the circumstances, Local 183 has put into issue the depth and nature of its knowledge of the job sites. The responding party states that, in order to permit it with a full and fair opportunity to respond to the assertion of prejudice made by the applicant, it ought to have access to all documents that are arguably relevant to the actual knowledge of the applicant of the disputed job sites in the context of this application for certification, but also in any other business context. It is asserted that in both contexts, the documents are arguably relevant to the question of whether representatives of Local 183 were able to identify the job sites on the basis of the description given of those sites in the response delivered and filed by the responding party.

19. The responding party provided certain qualifications and clarifications to its position during the exchange of submissions. It agrees that any documents produced should be subject to a confidentiality provision such as that contained in the Board's decision in this proceeding dated September 8, 2014. It also agrees that a limited amount of redaction would be appropriate, to the extent necessary to prevent disclosure of union supporters, consistent with the policy that underlies subsection 119(1) of the Act. Finally, the responding party confirmed that the Board should exclude from any production order that may be issued any document covered by solicitor-client privilege that has not been waived.

20. The applicant objects to the production request made by the responding party. It concedes that it ought to produce to the responding party any notes of its organizers that relate to the job sites that were recorded on the application filing date, as well as any photographs that relate to the job sites that were taken on the application filing date. However, it otherwise disagrees with the production order sought by the responding party.

21. Summarized briefly, the applicant states that the request made by the responding party is overly broad in both scope (because it requests documents in its possession that were created beyond the context of the efforts made by the applicant to file this application), and in time (because it requests documents that extend for an indefinite period of time preceding the application filing date). As a result, the applicant asserts that the documents are not arguably relevant to any live issue before the Board. The applicant also argues

that the documents sought are subject to litigation privilege and are of a sensitive nature to its operations. It describes the request for production as a "fishing expedition" and states that an order from the Board requiring the production sought will result in additional expense and unnecessary delay.

22. The applicant argues that the real issue before the Board is whether the responding party has filed information beyond the timelines considered allowable by reference to the Board's Rules, and whether the Board ought to provide leave to the responding party to rely upon that late-filed information. The applicant asserts that the documents sought by the responding party are not relevant to that issue. In addition, the applicant states that the Board has consistently held that there is a presumed prejudice to a trade union in circumstances such as those reflected above. For that reason as well the applicant asserts that the documents sought are not arguably relevant to any live issue.

23. In response to the arguments made by the applicant, the responding party states that the assertions made by the applicant that it was highly prejudiced by the description of the job sites upon which the four employees were working on the application filing date, and that it was impossible for the applicant to verify the assertions made by the responding party, make the applicant's knowledge of the existence of the job sites directly relevant. The responding party states that it is entitled to challenge the assertion of prejudice made by the applicant, and cites *Bolton Railings Limited*, 2014 CanLII 32310 in support of its position.

24. With respect to the argument made by the applicant that the documents sought are "sensitive" to the applicant's operations, the responding party states that sensitivity is irrelevant, and that the confidentiality order that it is prepared to abide by is a full answer to any such concerns. Finally, with respect to the argument made by the applicant regarding litigation privilege, the responding party states that there is no litigation privilege reflected on the facts of this proceeding.

25. Having considered the arguments made by the parties, I am of the view that an order ought to issue in favour of the documentary production sought by responding party.

26. The applicant states that it has been severely prejudiced in its ability to investigate the circumstances surrounding the work performed by certain employees on the application filing date because

the responding party did not include in its response an accurate address for the location where it claimed work was being performed by those employees. As a result, the applicant asks that the Board strike from the Schedule "A" list the individuals who are now said by the responding party to have worked at those newly-identified street addresses on the application filing date. The responding party takes issue with that request. It asserts that the applicant suffered no prejudice at all, because at all times the applicant's representatives were fully knowledgeable regarding those job sites, and knew that they had multiple street addresses.

27. The state of knowledge of the applicant's business representatives and other employees regarding the street addresses of the job sites identified by the responding party in its response is clearly in issue, and the documents sought by the responding party are arguably relevant to the determination of that issue. That is to say, there is clearly a logical or rational relationship between the documents sought by the responding party and the issue described above. Given the nature of the issue in dispute, there is no reason why documentary production ought to be limited only to the application filing date. The knowledge of representatives of the applicant prior to the application filing date, as well as immediately after the application filing date, is arguably relevant to the issue in dispute.

28. The applicant is correct in its assertion that the Board usually presumes prejudice in circumstances similar in nature to those present in the instant application. However, that is not universally so. The Board's decision in *Bolton Railings Limited*, cited above, suggests that in certain very limited circumstances the Board may permit an employer to adduce evidence explaining its conduct should a trade union simply claim inherent prejudice and deny the facts asserted by that employer. In essence, that is what is occurring here. The responding party states that the locations it included in its response were, in fact, accurate. The applicant disagrees, and asserts prejudice. The responding party takes issue with that factual assertion, and alleges that representatives of the applicant were well aware of the locations in question. It seeks production of documents in the possession of representatives of the applicant that will reflect its knowledge of those sites by those representatives.

29. Whether this is a proceeding in which the panel of the Board assigned to hear the merits will permit the responding party to challenge the assertion of prejudice made by the applicant remains to be seen. However, at this early stage, the responding party is at least

entitled to the production it seeks, so that it can pursue such an argument before the Board.

30. Finally, I note here that although the applicant asserts in its submissions filed with the Board that litigation privilege attaches to the documents sought by the responding party, it provided no substantive representations on its position. If a legitimate privilege exists with respect to any given document, the applicant can raise that issue during the production process. As noted above, the responding party does not seek production of truly privileged documents.

31. Accordingly, in accordance with subsections 111(2)(a) and (b) of the Act, and with respect to the following four job sites:

(1) Conservatory Infinity – 51 Lower Simcoe Street, Toronto, including 19 Grand Trunk Crescent and 25 Lower Simcoe Street;

(2) Fernbrook Homes – 2579 Sixth Line, Oakville, including 2450 Post Road;

(3) Darcon, The World on Yonge – 7161/7171 Yonge Street, Toronto; and

(4) Menkes, Gibson Square – 5162/5170 Yonge Street, Toronto,

the Board orders that the applicant produce to the responding party:

(a) all documents, reports, notes, text messages, emails, logbooks, receipts and any other records relating to activities by Local 183, its employees and/or agents at or in relation to any of the above job sites, whether or not such activity was in relation to this application;

(b) all records relating to work performed on the job sites by any contractor or subcontractor in contractual relations with Local 183, regardless when, so long as those records identify the job site or job sites specifically;

(c) all records with respect to any administration or business activities of Local 183 on the job sites relating to any work performed on the sites,

whether performed by the responding party or any other entity;

(d) all union organizer notes in respect to this application or any other application for certification or displacement, whether or not filed, in relation to the job sites;

(e) all pictures depicting any of the job sites;

(f) all records showing knowledge of the existence and nature of the job sites; and

(g) in respect of all documents noted above, where it is not apparent on the face of the document, particulars with respect to the document's creation, including the name of the person creating the document and the circumstances under which the document was created.

32. It is appropriate to impose a temporal limitation on the above-noted production order. Given the nature of the issue in dispute, the applicant is directed to produce the above-referenced documents to the responding party for each site in question for the time period commencing immediately after construction work started on each such site, and ending one calendar week after the date of delivery and filing of the response, namely July 31, 2014.

33. As noted above, the responding party acknowledges that it does not desire production of any document that is privileged, should such privilege not have already been waived by the party entitled to it. Should the applicant assert a claim of privilege over any given document, it is to identify for the responding party the date of the document and a general description of it, so that the responding party can determine whether it will dispute the assertion of privilege. If such a challenge is made, this panel of the Board will determine whether privilege in fact applies to the document should the parties not be able to reach an agreement regarding the disposition of the challenge.

34. This proceeding is scheduled for hearing on January 29, 2015, February 6, 2015, March 4, 2015 and March 9, 2015. The applicant is to produce copies of the documents included within the order set out immediately above to counsel for the responding party no later than December 12, 2014.

35. In order to ensure confidentiality regarding the documents provided, I direct both parties, their officers, agents, employees and counsel to abide by the following orders with respect to the use of documents produced at any time in this proceeding, whether they are entered into evidence or not:

1. All documents are to be kept confidential as among the parties;
2. No copies are to be made of any document except for the purpose of the hearing of this application;
3. No copies are to be circulated to third parties except as necessary for the conduct of the litigation of this application, and once that purpose has been completed the copies are to be retrieved from the third parties, except such copies as a professional person is required by law or a professional body to keep as part of his or her file;
4. The documents are to be used for the purposes of this hearing only and for no other or improper purpose;
5. All copies of all documents are to be returned to the provider of the documents at the conclusion of this application and any judicial review proceedings arising out of this application, save for one copy to be retained by each counsel in his or her file; and
6. No commercial information contained in any of the documents, and in particular no financial information found in a document, whether or not that commercial information is given in oral evidence, shall be disclosed to any person except for the purposes of this application, or except as required by law.

36. If there arises any further dispute regarding documentary production, or if any party seeks an addition or alteration to the above-referenced confidentiality provisions, any party may contact the Registrar to arrange for a conference call with this panel of the Board to deal with the dispute.

37. I will remain seized of this proceeding, but only for the purpose of dealing with any issues arising from documentary production.

“Lee Shouldice”
for the Board