



## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **2892-15-R**

Labourers' International Union of North America, Ontario Provincial District Council, Applicant v **Kenmore Developments Waterloo Inc.**, Kenmore Developments Inc., The Kenmore Group Inc., Kenmore Management Inc., Kenmore Management (2012) Inc., Kenmore Homes (K-W) Inc., Kenmore Homes (Waterloo Region) Inc., Kenmore Homes (London Region) Inc., Kenmore Homes (London) Inc., Kenmore Holdings (Niagara) Limited, Kenmore Homes (Niagara Falls) Inc., and Kenmore Homes (Niagara) Inc., Responding Parties

**BEFORE:** Michael McFadden, Vice-Chair

**APPEARANCES:** Adrienne Anderson and Francesco Commisso appearing for the applicant; John Illingworth and Paul Viidik appearing for the responding party.

**DECISION OF THE BOARD:** April 20, 2016

1. This is an application for certification in the construction industry under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that came before this panel of the Board on March 16, 2016 for a Case Management Hearing ("CMH") pursuant to the decision of the Board (differently constituted) dated February 12, 2016. The Board in that earlier decision determined the description of the appropriate bargaining unit but was unable, on the basis of the materials before it, to determine the percentage of employees in the bargaining unit who were members of the applicant on the date of application.

2. To summarize briefly, on February 4, 2016, the applicant filed a non-ICI construction industry application for certification in respect of Board Area 6 under section 128.1 of the Act. The applicant is seeking to represent construction labourers employed by the

responding party<sup>1</sup>, and alleged that there were three such persons at work in the bargaining unit on the application date at a residential housing project located at the Heritage Preserve subdivision at Kitchener, Ontario ("Heritage Project"). The responding party served and filed a timely response in which, among other things, it confirmed the Heritage Project was the project it had in operation on the application date but asserted that it employed four persons within the proposed bargaining unit on the application date and attached the requisite Schedule A that set out the names of those four persons.

### **CMH Issues**

3. In accordance with the Board's direction that they do so, the parties served and filed written submissions on the issues between them. As a result of my review of those submissions the parties agreed that the following issues could be decided at the CMH:

- (i) can the responding party rely on and lead evidence of what occurred on the application date at work locations outside of the Heritage Project?;
- (ii) has the responding party sufficiently particularized its objections to the applicant's proposed additions to the Schedule A?;
- (iii) pre-hearing production issues; and
- (iv) the fixing of hearing dates.

### **Disputed Work Locations**

4. As noted previously, in its response the responding party identified the site where relevant work activity took place on the application date as the Heritage Project. In the course of its written submissions, the responding party identified several sites outside of the Heritage Project (specifically, municipal addresses on Spring Creek and Stillwater Streets in Kitchener) that it says that each of the four persons it originally listed on the Schedule A spent part of the application date doing labourers work. The responding party also

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<sup>1</sup> the applicant has named a number of separate entities as the responding party and I use that singular term throughout this decision as a matter of convenience only. The parties anticipated being able to resolve between themselves the proper identity of the responding party, but if they cannot the panel hearing the merits of the case can decide that.

asserted that each of the four persons performed labourers work at sites within the Heritage Project on the application date. At the CMH counsel for the responding party confirmed that the non-Heritage Project municipal addresses were not adjacent to or within the sight line of the work that the responding party performed at the Heritage Project on the application date.

5. The applicant objected to the responding party being permitted to lead evidence or rely on the non-Heritage Project work sites. The applicant asserted that the Board's *Rules of Procedure* and its previous cases make clear that a responding party must identify all of the projects and their location that it seeks to rely on in response to the application in the response itself. The purpose of such early and complete site identification is not only to frame any issues in dispute but also to inform the applicant trade union at the earliest possible time of where work at issue is being performed so that the applicant trade union has a timely opportunity to seek to investigate the facts. In this case, applicant counsel asserted, the first notice that it had that the responding party would seek to rely on work performed at non-Heritage Project sites was February 26, 2016, more than two weeks after that information should have been provided (and more than three weeks after the application date). Applicant counsel asserted that attempting on or after February 26, 2016, to determine what tasks occurred at municipal addresses well away from the Heritage Project by her client would have been a waste of effort given the passage of time, meaning that there is prejudice to the applicant that cannot be alleviated and so any evidence about the non-Heritage Project sites should not be admitted. The applicant relied chiefly on the analysis and rationale set out in *Jam Finish Carpentry 2012 CanLII 1476 (ON LRB)*.

6. Counsel for the responding party, while he did not dispute that some prejudice might accrue to the applicant in the circumstances, nonetheless asserted that the prejudice was not so overwhelming that work performed at the non-Heritage Project work sites should be excluded. That is especially true in this case, counsel further asserted, because there is no evidence that the applicant took any steps to even seek to investigate the circumstances of work performed on the application date at the non-Heritage Project work sites when it did find out about them. Counsel also asserted that the Board should not direct witnesses to be truthful about what work the witness performed on the application date but not in respect of what the witness did at particular sites. Counsel for the responding party relied chiefly upon the analysis

and rationale set out in *Rivalda Oaks Kitchens* 2010 CanLII 15953 (ON LRB).

7. The responding party will not be permitted to rely on work that was performed at non-Heritage Project work sites on the application date. I am satisfied that the distance of the non-Heritage Project properties from the Heritage Project (meaning that it would not be the case that a mere look around by a person observing the Heritage Project work sites would have revealed them) and the passage of time between the filing of the response and the disclosure of the allegation of the non-Heritage Project work sites creates prejudice for the applicant that cannot be mediated. Further, no reasonable excuse for the failure by the responding party to disclose the non-Heritage Project work sites in the response was proffered by the responding party.

8. I am satisfied that my decision on this issue raises no particular problems for the conduct of the case and the calling of evidence. There is no reason why any witness giving evidence should be expected or be asked to be other than truthful about his or her work activities on the application date. If a witness is called to testify who is alleged to have worked at a non-Heritage Project site on the application date I see no difficulty in asking that witness to confine him or herself to his or her activities on Heritage Project work sites. Alternatively, if that witness might truthfully state that he or she engaged in tasks on the application date at a site other than the Heritage Project on the application date and describes those duties notwithstanding the confinement request referred to immediately previous that does not mean the Board panel hearing the case is bound to accept and rely on those particular facts.

### **Responding Party's Particulars**

9. The responding party challenged all of the applicant's additions to the employee list on the basis that they were not employees of the responding party but instead the employees of a third-party labour supplier known as "Labour Ready". The applicant disputed that characterization and stated further that in any event the responding party was the "true" employer of the disputed employees and so they should be placed on the list. The applicant also asserted that because the responding party had insufficiently particularized its assertion that Labour Ready was the true employer that position should be struck.

10. I was not prepared to strike the assertions of the responding party at the CMH as requested by the applicant. However, I proposed to counsel for the responding party that his client proceed first with its evidence in respect of the disputed "Labour Ready" employees (without this transferring the legal onus of proof on to his client) and he agreed to proceed in this fashion at the hearing.

### **Production issues**

11. Counsel stated that they would be cooperative in the pre-hearing production of arguably relevant documents. I commend them for that. Counsel agreed to put their respective pre-hearing document production requests to each other in writing and reply in writing to any such request within a reasonable period of time. Should any issue arise concerning pre-hearing document production after that exchange I will reconvene the CMH by conference call to resolve same on reasonable notice to the Registrar, provided any such issues are put before me at least two weeks ahead of the first scheduled hearing date. If the CMH is re-convened for these purposes it will be sufficient for one of the counsel to file with the Board in advance of the conference call the pre-hearing document production correspondence between them in order to frame the issues.

### **Hearing Dates**

12. At the CMH the parties agreed that this application would proceed on the merits on **September 7, October 13 and 14, 2016**.

13. Except for pre-hearing production issues as described at paragraph 11, above, I am not seized.

14. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

"Michael McFadden"  
for the Board