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

DECISION OF THE BOARD: September 30, 2016

1. The decision deals with a request for reconsideration ("RFR") that was filed by the responding parties (referred to collectively as "Kenmore") on September 9, 2016 in respect of a decision that I released on April 20, 2016 ("April 20 Decision"). That earlier decision arose out of a case management hearing ("CMH") that was held on March 16, 2016. The RFR requests a reversal of the determination made in the April 20 Decision that Kenmore not be permitted to tender, or rely on, evidence concerning work performed at certain sites by certain workers (as more particularly described below) on the certification application date.

2. For the reasons set out further below I am satisfied that the RFR should be granted and that Kenmore should be entitled to tender that evidence.

Background

3. On February 4, 2016 the applicant, Labourers' International Union of North America, Ontario Provincial District Council ("LIUNA OPDC"), filed a card-based construction industry certification

application under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in which it sought bargaining rights in respect of all construction labourers employed by Kenmore in all of the non-ICI sectors in Board Area 6. The applicant alleged that on the application date Kenmore employed three construction labourers at a residential project known as "Heritage Subdivision" located at Kitchener ("Heritage Project"). Kenmore filed a timely response on February 10, 2016 in which, among other things, it asserted that it employed four construction labourers at the Heritage Project. In its response Kenmore did not identify any work locations apart from the Heritage Project.

4. In the course of written submissions filed on February 26, 2016 (made in anticipation of the CMH), Kenmore asserted for the first time that the four persons it identified as its employees in the response also performed work as construction labourers on the application date at two other housing subdivisions at Kitchener (I will refer to these further work locations as "Site B" hereafter) apart from the Heritage Project.

April 20 Decision

5. At the CMH counsel for LIUNA OPDC objected to Kenmore seeking to rely on the Site B work for any purpose because it was first identified by Kenmore long after it was required to do so in its response, no explanation for the delayed identification had been proffered and the passage of time created "extreme prejudice" for LIUNA OPDC in terms of its capacity to investigate the circumstances. Counsel for Kenmore did not dispute that the delay in identifying the Site B work may have caused some prejudice to LIUNA OPDC, but not so much that Kenmore should be precluded from relying on the Site B work. Moreover, counsel for Kenmore submitted, there was no evidence or even assertion by LIUNA OPDC that it attended at Site B to attempt to investigate the circumstances there after Kenmore identified Site B in its written submissions, so the Board should discount the claim of prejudice on the part of LIUNA OPDC. Counsel for Kenmore confirmed when asked by me at the CMH that although both the Heritage Project and Site B were located within Kitchener they were not in proximity to each other, and that one project could not be observed from the other. Counsel for LIUNA OPDC responded to the issue raised about its representatives not attending at Site B after it was identified in Kenmore's written submissions by saying that by then (February 26, 2016), being just over two weeks after the response

was filed and just over three weeks after the application date, there would be no utility in doing so because of the passage of time.

6. Having heard and considered these submissions at the CMH in the April 20 Decision I determined that Kenmore would not be able to rely on the Site B work. My full reasons for doing so are set out at paragraph 7 of that decision, but in summary, I precluded such reliance because the passage of time between the filing of the response and the disclosure of Site B had created prejudice that could not be satisfactorily alleviated, and because Kenmore had provided no reasonable excuse for the delayed disclosure.

Basis For RFR

7. On or about August 29, 2016, as part of its pre-hearing production obligations, LIUNA OPDC produced a volume of site photographs and organizers notes to Kenmore. In reviewing same, counsel for Kenmore discovered for the first time that organizers for LIUNA OPDC had been at Site B on the application date, took photographs of the specific areas where Kenmore said its labourers were working that day and reviewed notes made by an organizer on the application date in which that organizer made inquiries of some workers in the area of Site B as to the attendance of Kenmore employees at Site B on that date. I have reviewed the notes, and the material sections in respect of Site B state (I am summarizing here) that the organizer learned that Kenmore had a project in operation at Site B and attended there on the application date between approximately 10:40 a.m. and 11:15 a.m. ("First Visit") and 1:48 p.m. and 2:00 p.m. ("Second Visit"). In respect of the First Visit, the organizer noted that the site appeared to be "active" but he or she saw no labourers or site supervisors at work at site B, and two drywall employees he or she happened upon told him or her that there were no Kenmore labourers or site supervisors at that location. In respect of the Second Visit, the organizer writes that he or she was at Site B between the noted times and saw no Kenmore labourers or site supervisors.

8. The basis for the RFR asserted by Kenmore is that at no time at the CMH and at no time prior to August 29, 2016 did LIUNA OPDC advise it or the Board that its organizers not only knew about Site B on the application date but that its organizers had attended at that site and investigated the circumstances. If these facts had been disclosed in a timely fashion (that is, prior to or at the CMH), Kenmore submits, its counsel would not have conceded that there was any prejudice to

LIUNA OPDC arising out of the delay in identifying Site B nor, it submits, would the Board have accepted that there was merit to the assertion by LIUNA OPDC that there was such prejudice. Kenmore requests that the RFR be granted and that it be entitled to tender evidence about Site B on the application date.

9. Counsel for LIUNA OPDC responds that while she did not volunteer at the CMH (or before) that its organizer had been at Site B on the application date no one asked her if that was so. Counsel for LIUNA OPDC submits that, as the adverse party to Kenmore in the proceedings, it cannot be held in jeopardy for whatever assumptions Kenmore may have made before or at the CMH. LIUNA OPDC counsel submits that Kenmore had a full opportunity to satisfy itself of all the relevant facts at the CMH, and is now simply seeking to reargue the case it submitted at the CMH on facts it could have known but did not. Further, counsel for LIUNA OPDC maintains that a distinction must be drawn between what it did through its organizer on the application date and what it could reasonably have done on February 26 or thereafter. Specifically, the assertion is that while LIUNA OPDC through its organizer investigated Site B on the application date, when it was not identified in the response, LIUNA OPDC reasonably ignored it thereafter. By reasonably ignoring it, LIUNA OPDC lost the opportunity to further investigate Site B on or near February 10, the date of the response, when the facts might more readily have been discoverable and the person's recollections of what they did on the application date fresher and less likely to have suffered from the inevitable corrosive effect of the passage of time. In the submission of LIUNA OPDC, to be expected to do so on or after February 26, 2016 was simply too late in time to be of any utility. In summary, LIUNA OPDC submits that the prejudice upon which it relied on at the CMH remains the same. Finally, LIUNA OPDC submits that Kenmore has still not proffered a reasonable explanation for its original delay in identifying Site B. LIUNA OPDC urges the Board to dismiss the RFR.

Decision

10. I am satisfied that had I known that LIUNA OPDC had in fact investigated Site B on the application date I would have been much less likely to exclude that site as readily as I did in the April 20 Decision. As the April 20 Decision makes plain, I agreed with the submission of LIUNA OPDC counsel made at the CMH that it suffered prejudice that could not be alleviated. I formed this view because I understood on the facts as they had been put before me that LIUNA OPDC could not have known about work being performed at Site B

because it was not in proximity to the Heritage Project site. As noted above, I specifically raised this (the proximity of the work sites to each other and whether LIUNA OPDC organizers would have been able to observe one work site from the other) with counsel for Kenmore at the CMH, and even in those circumstances counsel for LIUNA OPDC did not advise me that a LIUNA OPDC organizer had been at Site B (twice, as it happens) on the application date. My understanding of the facts, being that LIUNA OPDC had no reasonable opportunity to investigate the circumstances of Site B (or even know about it) until February 26, 2016 at the earliest, led me to conclude that LIUNA OPDC did suffer prejudice as alleged. In the result, the impugned paragraph of the April 20 Decision was based on my mistaken understanding of the facts.

11. In this particular case, and what weighs in the balance in favour of granting the RFR, is that I am satisfied that LIUNA OPDC through an unreasonable omission contributed to my misunderstanding of the facts. I distinguish what happened in this case from what might happen in a case where a party who could have sought to proffer facts that would support a position fails to do so and then later seeks reconsideration of the decision based on those facts not proffered in the hearing of the case. Here, the only party that did know prior to August 29, 2016 that LIUNA OPDC had investigated Site B on the application date was LIUNA OPDC. Counsel for Kenmore did not know that at the CMH and could not reasonably have suspected that given the way that LIUNA OPDC pled its case. A CMH is not usually (and the one on March 16, 2016 was not) a full evidentiary hearing where witnesses testify under oath and are subject to cross-examination. Further, I did not know that a LIUNA OPDC organizer had investigated Site B on the application date and had no reason to suspect so given the way the case was pled. A Vice Chair hearing a CMH should not be expected to cross-examine counsel to obtain a complete picture of the facts that will inform his or her decision. That I formed the view that LIUNA OPDC had no reasonable opportunity to know about and investigate Site B until February 26, 2016 should have been obvious (and in my view was obvious) from my questions to Kenmore counsel about the proximity of the sites to each other. Given my stated misunderstanding of the actual facts at the CMH it was incumbent upon LIUNA OPDC to not let that misunderstanding persist.

12. As a result of the Board's approach, employers who, after having already filed a response, later claim reliance on work sites or employees said to be at work in the bargaining unit on the application date face great peril in having that evidence admitted. The oft-stated

principle that is the foundation of the Board's approach in this respect, one that I fully and completely endorse, is that the passage of time, even a short passage of time (literally measured in only days), can lead to lost or unrecoverable evidence and that is a prejudice to the trade union that is difficult to alleviate (see *Reid's Uptown Homes*, 2007 CanLII 17488 (ON LRB) for example). The Board typically does not engage in an analysis of how much prejudice there must be in order to deny late-filed information, the quantum of prejudice in other words, because the typical prejudice being asserted is qualitative – the lost opportunity to investigate claims in a timely fashion.

13. Whether to admit late-filed information is a matter of Board discretion. In exercising that discretion the Board is called upon to consider and weigh in the balance (among other things) the prejudicial effect or potential effect on the employer's case (and its capacity to mount a defence) of excluding that information against the qualitative prejudice the applicant will suffer if that information is admitted. As noted above, in many cases the concern for prejudice created for the applicant is the weightier concern. Given the Board's especial focus on the qualitative prejudice that visits upon a trade union which asserts that such late-filed evidence should be excluded, it is incumbent on the trade union seeking to exclude such evidence on that basis that it be candid about the material facts that would establish such prejudice. In this case, given that LIUNA OPDC based its prejudice assertion on a claim of a lost opportunity to investigate the work site in a timely fashion, it is an obviously material fact in considering that claim of prejudice that a LIUNA OPDC organizer attended at and investigated Site B on the application date.

14. I wish to state very clearly that nothing I have said here should in any way be taken as changing the onus in such circumstances. In seeking to rely on late-filed evidence in a construction industry certification application the onus is clearly on the party seeking to rely on that late-filed evidence to have it admitted and the test for admission is a stringent one. In this particular case, as a result of the way the case was pled and the way that submissions were made and the questions that were asked at the CMH, it should have been obvious that I had formed a misunderstanding of the facts (i.e., that LIUNA OPDC did not know about Site B before February 26, 2016). The correct facts were necessarily and only within the knowledge of LIUNA OPDC. At that point, it became incumbent upon LIUNA OPDC to ensure that the correct facts were before me.

15. If I had known at the CMH that LIUNA OPDC had been to Site B on the application date, found nothing that led them to believe that Kenmore employed construction labourers there on the application date, and did not go back to Site B after they found out on February 26, 2016 that Kenmore would seek to rely on it, I would certainly have considered and taken seriously the argument now being made by LIUNA OPDC that by that late date doing any further investigation would have had no utility. The weight of this argument would have been significant given the failure of Kenmore to explain its delay in identifying Site B. But that argument was not made at the CMH but instead is being raised for the first time in the RFR response. It is difficult for me to take that submission seriously now at this late date when it could have been (and should have been) tendered at the CMH. In my view it would be unfair to Kenmore to do that at this point and I am not prepared to do so.

16. This by no means was a decision I came too readily. Kenmore has still not proffered a reasonable explanation for why they did not identify Site B in its response to the application for certification. Nor am I without concern for the qualitative prejudice that may have accrued to LIUNA OPDC because it reasonably ignored Site B after February 10, 2016 when it was not identified in the Kenmore response to the application for certification. On balance though, considering all of the factors that I have identified above, I am satisfied that the failure of LIUNA OPDC to correct in a timely fashion my obvious misunderstanding of central facts, facts that were specifically only within its knowledge, and facts that were relevant to my weighing the prejudice to each party, mitigates the claims made by LIUNA OPDC of the seriousness of the qualitative prejudice enough such that the late-filed information should be admitted.

Result

17. In the result, I hereby grant the RFR of the April 20 Decision and declare that Kenmore is entitled to tender evidence concerning work it alleges was performed within the bargaining unit at Site B on the application date.

18. I am not seized.

"Michael McFadden"
for the Board