ONTARIO LABOUR RELATIONS BOARD

1768-13-U UNITE HERE Local 75, Applicant v. **Richtree Markets Inc.**, Responding Party.

BEFORE: Bernard Fishbein, Chair.

APPEARANCES: Jorge V. Hurtado, David Sanders and Frank Piserchia for the applicant; Greg McGinnis and Lexis Termini for the responding party.

DECISION OF THE BOARD: January 7, 2014

1. This is an application under section 96 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended ("the Act") alleging violations of sections 17, 56, 70, 72, 76 and 86 of the Act. A parallel application under section 101 of the Act for a declaration of an unlawful lock-out which had been scheduled on an expedited basis was dismissed for failing to make out a *prima facie* case by decision of the Board dated October 4, 2013.

2. This application was then scheduled on the agreement of the parties for hearings on December 10, 2013 and continuing on December 16, 19 and 20, 2013 as necessary. At the outset of the hearing on December 10, 2013, the applicant UNITE HERE Local 75 (the "Union" or "Local 75") suggested that as a threshold issue the Board determine whether the Union's bargaining rights continued to exist at the newly opened restaurant of the responding party Richtree Markets Inc. ("Richtree"). Richtree's position was that those bargaining rights did not continue in the new location but rather were confined to the old location – the restaurant that had closed.

3. Richtree agreed with the suggested way of proceeding. However, neither party was prepared to proceed on that basis that day and the balance of the day was adjourned on the agreement of the parties. The hearing scheduled for December 16th was also adjourned on the eve of the hearing on the agreement of the parties due to the illness of Union counsel. The hearing then proceeded on December 19 and 20, 2013. The Board heard from two Union witnesses, Frank Piserchia ("Piserchia"), an employee of the Union since 1994 and its Secretary-Treasurer from 1996 until August 2012, and Janice Josephine ("JJ") Fuefer, currently a researcher for the Union. The sole Richtree witness was Andre Sa-Machado, the present Executive Vice-President for Finance and Operations of Richtree. In the end there were no serious issues of credibility with respect to the evidence (at least in this portion of the hearing) and not much, if any, disagreement about those "facts" adduced before me – even if there was about the impact or significance of them.

Background

4. This application arises out of the closing of Richtree's restaurant in the Eaton Centre on January 28, 2013 ("the former restaurant") and the opening of its new restaurant ("the new restaurant") on September 9, 2013 in the former food court at the southern end of the Eaton Centre. As stated before, Richtree takes the position that the Union's bargaining rights at the former restaurant do not apply to the new restaurant.

5. The Eaton Centre is a large enclosed shopping mall in downtown Toronto. The former restaurant was located at the south end of the Eaton Centre on its lowest level (below street level). The new restaurant is also located on the lower level of the mall (approximately 50 metres from the location of the former restaurant) where a food court was formerly located at that end of the mall.

6. The Union has a long relationship with Richtree (or its predecessors) that goes back to 1994 – covering other restaurants at other locations that have now closed and ceased operating. The Union's particular bargaining rights here arise from a certificate issued by the Board dated April 10, 1996. The certificate was for a bargaining unit of "all employees of Movenpick Marchelino - Eaton Centre employed at the Toronto Eaton Centre in the Municipality of Metropolitan Toronto". A number of successive collective agreements were then entered into between the Union and employers variously described (and there is no dispute that Richtree is the successor of those previously-named employers), but the recognition clauses of those collective agreements were always described in terms of "all employees of the restaurant located at Eaton Centre, Toronto".

7. In 2002, the Union also obtained a voluntary recognition agreement for another Richtree Restaurant located at 305 York Mills Road in the City of Toronto ("the York Mills location"). Initially, a separate collective agreement was entered into between the Union and Richtree for the York Mills location. The bargaining unit was described as all employees located at 305 York Mills Road. The Union wished to have both of those collective agreements, the Eaton Centre and the York Mills location, consolidated or combined into one collective agreement as the terms were largely the same and it was the same employer. The Union asserted that this would be more efficient and economical. Ultimately, the Union achieved this in the negotiations for the 2006-2009 collective agreement. The Memorandum of Settlement has a specific provision dealing with amending the recognition clause of the new combined collective agreement which appears to be dated November 29, 2006. It provides:

> 2.01 Amend to read, "The provisions of this agreement shall apply to all employees of Richtree Markets Restaurants Inc. located at 305 York Mills Road cob. Richtree Market Restaurants and also located at the Eaton Centre **220 Young [sic] Street,** Toronto ON c.o.b. Richtree Market Restaurants Inc. ..."
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> [emphasis added]

This amended bargaining unit description was continued in the renewal (and current) collective agreement in 2010 which expired on March 31, 2012 which on its front page indicated it was between:

> "Richtree Markets Inc. – Bayview: 305 York Mills Road, Toronto – Eaton Centre: **220 Yonge Street**, Toronto"
>
> [emphasis added]

and the Union. The recognition clause again was for "all employees of Richtree Markets Inc. located at 305 York Mills Road, c.o.b. as Richtree Market Restaurants Inc. and also located at the Eaton Centre, **220 Yonge Street**, Toronto, ON c.o.b. Richtree Market Restaurants Inc. …" [emphasis added]

8. Surprisingly, I heard from no witnesses who were at the bargaining table at the 2006 negotiations when these amendments to the recognition clause were made. The only evidence I heard with respect to that bargaining was from Mr. Piserchia. He testified that although he was not present at the bargaining table in 2006, obviously not privy to the discussions at the table, had no knowledge of who had formulated this particular language (let alone who had actually proposed it), and was not one of the Union signatories to the Memorandum of Settlement, the Union bargaining representatives reported to him. Mr. Piserchia asserted that although the Union certainly wished to have the two agreements consolidated into one agreement, the Union never intended to confine or restrict the scope of its bargaining rights at the Eaton Centre. He speculated that since the Union office was then at 229 Yonge Street (at Yonge Street and Shuter Street, across from the Eaton Centre, where the Union employees frequently parked) and since he and the Union employees frequently went to the former restaurant, the Union negotiators probably assumed that was the proper address of the Eaton Centre.

9. Mr. Piserchia indicated that John Helson ("Helson") was the Union representative who headed the Union bargaining team and was present at the bargaining table. That bargaining was conducted after the merger between HERE (of which the Union was a constituent local) and UNITE. Helson had been a member of the HERE staff and was explicitly assigned to report to Piserchia about this bargaining by the merged union since Piserchia was familiar with these bargaining units and had a longstanding relationship with Richtree or its predecessors. There is no dispute that after the merger there was a lengthy, acrimonious and litigious split between the UNITE and the HERE, and Helson is now employed by the former UNITE portion of the Union (and not Local 75). The Union explained that Helson was not called as a witness because in light of the acrimonious split between the two unions and since he was now employed by the other union, he was expected to be a hostile witness.

10. I pause to note that, as I observed at the hearing, this is a spectacularly unpersuasive explanation for the failure to call Helson. Leaving aside that the Board has procedures to compel the attendance of Helson (summons, etc.), as Richtree also pointed out, the Board also has procedures to deal with allegedly hostile witnesses. As well, the

Union failed to call any other participants from the 2006 collective bargaining (whether Union representatives or employees) or failed to explain their unavailability. In fact, no one even explained to me who actually were the signatories to the 2006 Memorandum of Settlement. Having said that, I am reluctant to draw any adverse inferences from the failure to call such witnesses – simply because Richtree is as guilty of this as the Union. The sole Richtree witness, Mr. Sa-Machado, commenced employment with Richtree in May 2012 and was promoted to his current position in October 2012. Equally, no one from Richtree was called to explain the context of those 2006 bargaining unit amendments or what they were intended to achieve. Moreover, Richtree did not even proffer any explanation whatsoever for the failure to call any such witnesses.

11. In the end, I am left simply with the evidence that the previously unmodified bargaining unit description of the "Eaton Centre Toronto" was changed in 2006 and that the change was continued in the successor collective agreements.

12. Piserchia did participate in some portions of the 2010 negotiations for the renewal collective agreement – but all he could say was that the issue of scope of the recognition clause did not come up (at least in those portions of the negotiations that he participated in).

13. There is no dispute that the official municipal address of the Eaton Centre is 1 Dundas Street West. I was presented with various documents (many of which were public documents that were easily accessible) to this effect and the parties stipulated to that fact. However, it equally appears there is no dispute (and the parties stipulated to this as well) that it is possible to obtain from the City of Toronto what is referred to as a convenience, or street, or entrance address – but it does not change the official municipal address.

14. The former restaurant faced only onto the mall on the lower level of the Eaton Centre. There was no other access and certainly no street access directly to the former restaurant. The new restaurant occupies a much greater space than the former restaurant (18,000 sq. ft. vs. 2-3,000 sq. ft.) and was described by Mr. Sa-Machado as "several restaurants within a restaurant" (e.g., a salad bar, a sushi bar, a sandwich bar, Asian rolls, burgers, tacos, pizza). Richtree seeks to attract a greater dinner crowd and a greater after-hours crowd (in the sense of after the mall stores close) at the new restaurant. In order to achieve this, the plans for the new restaurant always (and certainly well before the closing of the former restaurant – the "base" lease for the new restaurant is dated March 30, 2010) called for the creation of street access to the new restaurant. A rendering of the street access entranceway on Queen Street to the new restaurant was adduced in evidence. It was not possible to construct this in time for the opening of the new restaurant in September of 2013. For example, I was told Richtree received the licence to open the new restaurant at 5 o'clock on September 9, 2013 and it opened at 6 o'clock on the same day.

15. However, Cadillac Fairview, the landlord at the Eaton Centre, at the behest of Richtree, applied to the City of Toronto for the designation of a street address for the new location. The granting of this was confirmed by a letter dated June 24, 2013 from the City of Toronto – an entrance address of 14 Queen Street West (although the letter made clear the "Official Record Municipal Address" remained 1 Dundas Street West). The letter was addressed to Susan Allan at Cadillac Fairview (who was identified in evidence as the General Manager of the Eaton Centre) – interestingly enough, at 220 Yonge Street. In fact, it appears that immediately following, a number of the city permits with respect to the construction of the new restaurant (building permit, plumbing permit, HVAC permit, building revision permit) were changed from "220 Yonge St. to 1 Dundas St. W. (convenience address 14 Queen St. W.)". That was after the closing of the former restaurant but prior to the opening of the new restaurant. There is no dispute that the Liquor Sales Licence for the new restaurant, dated September 13, 2013, indicates the address of 14 Queen Street West.

16. There is no dispute that at present, this street, convenience or entrance address, is displayed publicly nowhere (let alone is there any restaurant signage on Queen Street) and there is no street access from Queen Street to the new restaurant. The location of the doors where that street access is planned to be is now inaccessible from Queen Street – those doors currently open only from the interior of the building and serve as part of the fire escape route from the Eaton Centre and the office building (20 Queen Street West) attached to it. Mr. Sa-Machado says the plan is to have this street access constructed by the end of the first quarter or the beginning of the second quarter of 2014.

17. So what am I to make of the obviously deliberate and intentional change to the bargaining unit description first made in 2006 and continued until the end of the current collective agreement describing the Eaton Centre as "220 Yonge Street"?

18. The Union presented me with various "snapshots" of various websites to indicate how the Eaton Centre represented itself to the public or how it was perceived by the public. The Union did not dispute that it does not know the source of the information posted on these websites – only that it is available on these websites. For example, the current Toronto Eaton Centre website, under the heading Centre Information and Location, indicates the Centre address as "220 Yonge Street, Toronto, ON". Equally, so does the Toronto Eaton Centre website as of April 5, 2006 (provided through the website of Internet Archive), indicate the contact information for the Eaton Centre as "220 Yonge Street". The current Cadillac Fairview website which identifies various properties it owns and operates, including the Toronto Eaton Centre, gives in the general information about the Toronto Eaton Centre, its address as 220 Yonge Street. A website entitled "Toronto-restaurants" gives the address for former restaurants located at the former food court (where the new restaurant is now located) as 220 Yonge Street (e.g. Harvey's – a popular hamburger chain – as does the cached website for Druxy's Famous Deli, for its former location in the now-closed food court). Another popular website, "Foursquare", gave the address of the former Eaton Centre food court as 220 Yonge Street. As well, I was given "snapshots" of various other popular general

information websites, "Yellow Pages", "Wikipedia", "Yelp" as well as "Foursquare" which all identified the contact address for the Toronto Eaton Centre as 220 Yonge Street.

19. Piserchia presented copies of the various business cards of several Richtree officials whom he had dealt with over the years; Jo-Ann Galvez (Human Resources Coordinator), Matt Williams (Vice-President & Chief Operating Officer), Patric LaFlamme (Regional Manager) and Sutha Sundarampillai. Of particular note was the business card of Mr. Sundarampillai who was the General Manager of the former restaurant and whose business card stated "Eaton Centre, 220 Yonge Street". Although Piserchia conceded in cross-examination that Sundarampillai's business card was different than the others (in that it did not carry the Richtree logo or give the Richtree office address at the time, like the others), Piserchia also conceded that he did not know by whom or how Sundarampillai's business card was printed. However, no evidence on this point at all was adduced by Richtree in response.

20. Equally, the Eaton Centre Tenants' Handbook or Manual was placed in evidence before me. It offers a slightly different perspective about 220 Yonge Street. To quote:

> "Toronto Eaton Centre is owned and managed by Cadillac Fairview. A well-known landmark in the heart of downtown Toronto, Toronto Eaton Centre is one of North America's premier mixed-use facilities. With over 1.5 million square feet of retail space, 250 shops and services including leading national and international brand retailers, Toronto Eaton Centre continues to be one of the largest shopping centres in Canada. **There are three office towers in the centre providing approximately 1.9 million square feet of prime office space: The Cadillac Fairview Tower (20 Queen Street West), 250 Yonge (250 Yonge Street) and 1 Dundas (1 Dundas Street West)**. **In addition, the Galleria offices provide 2 levels of interior Centre office space.** ..."
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> [emphasis added]

21. Later, the handbook identifies the: "220 Yonge Galleria" as the two floors of office space located inside the Toronto Eaton Centre. There is no dispute that the administrative offices of the Toronto Eaton Centre are located on the first level of these Galleria Offices. A photograph of the office plate for the Galleria identifying it as 220 Yonge Street was also put into evidence.

The Positions of the Parties

(a) The Union

22. The Union asserts that its bargaining rights, since their origin, have been for the "Eaton Centre" without restriction and it has never intended to restrict the scope of

such bargaining rights – so those bargaining rights apply to the new restaurant. If any meaning is to be attributed to the 2006 changes incorporating "220 Yonge Street", it was to distinguish the York Mills location, also in a mall, from the Eaton Centre mall. More importantly, as a matter of policy under the Act, I ought not hold that the Union's bargaining rights have now been extinguished by a move of some 50 metres in the very same Eaton Centre to a "convenience" "entrance" or "street address" that, other than on paper from the City of Toronto, does not yet really exist – there are no signs or doors or entranceways for the new restaurant at 14 Queen Street West – even now, more than three months after the filing of this application, and the opening of the new restaurant.

(b) Richtree

23. Richtree simply says there is no persuasive or sufficient evidence to support the conclusion that the Union's bargaining rights exist at 14 Queen Street West. Whatever the scope of the Board's initial certificate or the first number of collective agreements, there is no dispute that the parties changed that description from Eaton Centre, *simpliciter*, to Eaton Centre, 220 Yonge Street, in 2006 and continued that qualified description until the closing of the former restaurant.

24. The only law referred to me by any party was by Richtree, who referred me to *Canadian Appliance Manufacturing Company Ltd.* (1978), 20 L.A.C. (2d) 59 (Shime) at pp. 63-64:

> It is not unusual to find a union described as the sole bargaining agent for a group of employees in a specific municipal area. Certificates granted by the Ontario Labour Relations Board generally define a bargaining unit as being within a municipal area: see, e.g., *Canadian Telephone Employees' Assoc. v. Tele-Direct Ltd.*, [1971] O.L.R.B. Rep. 490 (Boscar) [sic] at p. 491. Specific locations or street addresses are rarely, if ever, used to define the union's jurisdiction: see, e.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Canadian Chromolax Co.*, [1968] O.L.R.B. Rep. 980 (Egan); *Bakery & Confectionery Workers' Int'l Union of America, Local 264 v. Great Atlantic & Pacific Tea Co. Ltd.*, [1969] O.L.R.B. Rep. 1017 (O'Shea). To do so would eliminate bargaining rights by the mere change of address or location. The general practice has therefore been to describe bargaining units in terms of a municipal area in order to avoid the problems or industrial unrest that might occur should the company change its location.
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> Of course the limitation of bargaining rights to a municipal area does not completely protect bargaining rights because a company may move its operations to another municipality and, in that case, the union will lose such rights: see, e.g., *United Steel-workers of America, Local 4487 v. Inglis Ltd.*, [1977] O.L.R.B. Rep. 128 (Burkett) at p. 137. This potential loss is particularly offset by permitting the union to have bargaining rights in the event that new operations are commenced by the company within the municipality: see, e.g., *Amalgamated Meat Cutters & Butcher*

> *Workmen of North America, AFL-CIO, Local Union 633 v. Homedale IGA Foodliner (St. Thomas)*, [1964] O.L.R.B. Rep. 652; *United Rubber, Cork, Linoleum & Plastic Workers of America v. Goodyear Service Stores* (1965), C.L.L.C., para. 16,027, p. 711.
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> The underlying theory of the Labour Relations Board is that while an employer may change its address or location it will seldom move out of the municipal area, and that there is a greater measure of industrial stability if bargaining rights are limited to a municipality.
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> **This general practice has, for the most part, been adopted and understood by employers and unions when drafting collective agreements. No doubt unions have from time to time during bargaining sought to expand the recognition clause of their agreements to protect against possible changes in location by employers, while employers have sought to contract the recognition clauses to limit the employees who are represented by the union. However, bargaining rights are generally considered to be coterminous with the descriptions contained in a collective agreement: *Goodyear Service Stores*, *supra*. In short, the practice of describing the bargaining unit in a collective agreement and the general intent of the parties has generally been considered to be consistent with the practices and understandings of the Ontario Labour Relations Board, with the parties having full freedom to modify such recognition clauses through collective bargaining. The onus is therefore on the party which seeks to depart from the generally understood practice to demonstrate that the collective agreement warrants such an interpretation.**
>
> [emphasis added]

and *Centrestage Toronto*, [1985] OLRB Rep. Nov. 1560 at para. 11:

> 11. It is the usual practice of the Board to define an appropriate bargaining unit with reference to the municipality where an employer's place of business is located rather than with reference to a municipal address unless the employer has more than one place of business within a municipality. The Board set forth its policy in *T. R. S. Food Services Limited,* [1980] OLRB Rep. April 542, where it stated at pages 542-543:
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> > Where an employer has only one location within a municipality, the Board's consistent practice, apart from the construction industry, has been to describe the geographic scope of the bargaining unit by reference to the municipality rather than the respondent's particular location. This practice results from a balancing of two competing interests: the individual's interest preserved by section 3 of the Act to be free to join a trade union of his own choice, on the one hand, and, on the other, the concern of the Board as well as the union and

> employees involved in any particular case that sufficient stability adhere to the bargaining rights conferred....
>
> While limiting a bargaining unit to the respondent's particular location would give considerable latitude to an individual's freedom to join a trade union of his own choice, it could, at the same [time], jeopardize the stability of the bargaining rights conferred upon the union. **If an employer moves the location of its operation in a situation where the bargaining unit has been defined by reference to the employer's street address, the union's bargaining rights may be extinguished by the move. The Board's general policy of describing the geographic scope of a bargaining unit by reference to the municipality in which the employer's operation is situated instead of the particular location inhibits bargaining rights from being disturbed in this manner.**
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> [emphasis added]

Richtree refers me to this jurisprudence so, it argues, the context of the changes in the bargaining unit descriptions may be properly understood. Without the change in the bargaining unit description in 2006 (if it had been left simply as the Eaton Centre), Richtree concedes it would have absolutely no argument here. But that change must have some meaning and I ought not just ignore it – particularly in a clear jurisprudential context where bargaining units restricted to street addresses are the exception and not the rule.

25. In terms of the policy argument of the Union, Richtree simply says that it is not just the Union's interests that are at stake. As pointed out in para. 11 of *Centrestage* and the quote from *T.R.S. Food Services Limited*, *supra*, there are also the interests of the employees at the new restaurant to consider (i.e., their rights to select a union of their own choice to represent them as opposed to having the Union "foisted" upon them) since all of the employees at the former restaurant have been terminated and paid any severance owing to them. Secondly, to assert an employer has obligations under a collective agreement, a union needs to establish those obligations exist – here the Union has failed to do so.

Decision

26. First, I have no quarrel with the jurisprudence referred to me by Richtree. However, it is of limited assistance to me. The original bargaining rights (the initial Board certificate and the first collective agreements) were never municipal-wide – they were always limited to "the Eaton Centre", presumably because there were other Richtree locations in the City of Toronto at the time. The new restaurant has not moved out of the Eaton Centre. The question is the impact, if any, of the clearly deliberate and agreed-upon addition of the words "220 Yonge Street" to the bargaining unit description in 2006 and continued in successive collective agreements until the closing of the former restaurant.

27. Second, as noted before, I have no direct evidence of those negotiations. Again, for whatever reasons (unconvincing in the case of the Union and none offered in the case of Richtree), that is the obviously deliberate choice of both parties and accordingly I make no adverse inference against either party on this count. I do not mean for my words about "adverse inference" to be mistaken as any comments about onus of proof – which is on the Union to demonstrate that the collective agreement covers the new restaurant. Rather, simply that the failure of the Union to call any better evidence about the 2006 negotiations does not lead me, *per se*, to conclude that Richtree's theory of the interpretation of the collective agreement is the correct one. In fact, it is not clear to me that Richtree ever really advanced its own theory of the interpretation of the words "220 Yonge Street" – other than it did not cover the new restaurant. If "220 Yonge Street" refers to the Galleria Offices at the Eaton Centre which at times seemed to be the suggestion of Richtree, even the former restaurant was not located there either. Simply put, Richtree called no evidence to assist me about the 2006 negotiations or the meaning of the addition of the words "220 Yonge Street" either.

28. Although I do not question the credibility of Mr. Piserchia's evidence in any way, I find his evidence of little, if any, assistance to me. He was not directly involved in those negotiations and other than the obviously self-serving conclusion that the Union never intended to limit the scope of its bargaining rights at the Eaton Centre, he offers no direct, let alone persuasive, evidence of why "220 Yonge Street" was added in 2006. The notion that it served to distinguish the York Mills location and address from the Eaton Centre is unconvincing. It is hard to accept any possible confusion between the York Mills location and the Eaton Centre that necessitates (let alone is resolved by) the addition of "220 Yonge Street". There is no dispute that to the extent that the York Mills location can even be described as part of a mall (as the Union attempted to do), it is only a handful of stores that are not enclosed – a far cry from the enclosed landmark of the Eaton Centre and its 250 shops and services and over 1.5 million square feet of retail space and not likely to be confused with it. Equally, Piserchia's observations that the negotiators likely thought that 220 Yonge Street was the address of the Eaton Centre because the Union office at that time was located at 229 Yonge Street, across the street, although possible, is pure speculation. In the end, I am left to determine the impact of the addition of the words "220 Yonge Street" on the face of the words themselves in the general context of the times.

29. In the end, I conclude that 220 Yonge Street is added as merely a description of the Eaton Centre – not a limiting qualification or restriction to only part of the Eaton Centre. I say this for a number of reasons. First, because it is the public representation of the location of the Eaton Centre (or even its contact address) as listed on the Eaton Centre's own website (not only currently but even the website at the time, in April 2006). It is also the representation of the owner/landlord – the Cadillac Fairview website listing its various properties including the Eaton Centre. Although I appreciate that this is the location of the Eaton Centre's actual administrative offices – in the two floors of the Galleria Offices which appears to have a street address of 220 Yonge – none

of the websites is so precisely limited or narrowly defined. Moreover, it is the address given for the Eaton Centre by many other general information and public websites – "Foursquare", "Yellow Pages", "Wikipedia" and "Yelp".

30. Secondly, 220 Yonge Street is the address given (to the extent I have any evidence at all) for some of the restaurants ("Harvey's", "Druxy's"), formerly located in the food court where the new restaurant presently is.

31. Thirdly, to the extent that Sundarampillai's (indisputably a senior representative and employee of Richtree) business card lists the Eaton Centre (and his was the only Richtree business card put in evidence not listing the actual Richtree offices), it gives 220 Yonge Street as the address. I appreciate Richtree attempted to cast doubt on this by eliciting, in the cross-examination of Piserchia, that he did not know whether Sundarampillai printed these cards on his own, under whose authority and under what circumstances – but in the end, Richtree chose to call no evidence on this point either. I am left with the not unreasonable inference that Richtree (and certainly Sundarampillai), as well as many others, apparently regarded the Eaton Centre and "220 Yonge Street" to be interchangeable.

32. I also appreciate, as Richtree pointed out in argument, that much of the Union evidence comes from the internet – which certainly cannot be described as an always infallible or reliable source of accurate information. However, I do not think that it is a fatal defect in the circumstances – and certainly not of a magnitude to compel me to ignore or discount the evidence altogether. Leaving aside that section 111(2) gives the Board the power to accept such evidence as in its discretion it considers proper, whether admissible in a court of law or not (which I would do here), what we are talking about here is what people would understand a reference to the Eaton Centre to mean – and whether a reference to "220 Yonge Street" means such a specific and confined portion of it so as not to include a portion of the Eaton Centre a mere 50 metres away across the corridor or common laneway of the mall. In these circumstances and in this regard, so many different third-party (and disinterested in this dispute between the Union and Richtree) public websites can reliably be given weight. More importantly, and again, Richtree chose to call no directly countervailing evidence to the contrary or to explain the easily drawn inference that 220 Yonge Street, if it did not include the Eaton Centre in its entirety, at least included the former food court.

33. What am I to make of the fact that in June 2013 (years after the introduction of "220 Yonge Street" into the collective agreements, and only months prior to the opening of the new restaurant), Richtree was able to obtain a new street or convenience or entrance address of 14 Queen Street West – and that this appears on the Liquor Sales Licence and some municipal construction permits were amended to reflect this? In the end, I do not think this (combined with a move of some 50 metres across the mall corridor or laneway) is enough to extinguish the pre-existing (for more than 15 years) union bargaining rights. If the name of the street had simply changed (particularly at the behest of the employer), I would not have regarded that as sufficient to extinguish union

bargaining rights identified or restricted by the former street name. Although the nature of the restaurant may be significantly different than the former restaurant (both in size and style), Richtree conceded that the change would not be of such a substantial nature as to extinguish the Union's bargaining rights if this, for example, were an application under section 69(5) of the Act (and it is not) – or in other words, but for this change in address, there is no dispute the collective agreement would apply to the new restaurant.

34. Although I have no reason to doubt at this point that Richtree's desire for street access to the new restaurant and hence the need for a street/convenience/entrance address is for other than *bona fide* business reasons (and long planned and always envisaged in the plan of the new restaurant) – and not a convenient ruse or opportunity to rid itself of the Union – the fact remains that there is presently no entrance, no street access to the new restaurant, and no restaurant signage at 14 Queen Street West. Other than on paper (a Liquor Sales Licence and some municipal permits), 14 Queen Street West has no visible or real existence. Ultimately, I am not persuaded that in the circumstances of this case, the Union's bargaining rights should be extinguished by a move of some 50 metres across the corridor of the mall to a space only recently labelled with different street, convenience or entrance address that presently has no real existence other than on a piece of paper – particularly when there is no doubt that the official municipal address of the Eaton Centre has not changed (and obviously not moved).

35. Before concluding, I also note that Richtree argued that it was not just the Union's interests that were at stake but also the interests of the employees at the new restaurant – their interest in being represented by a trade union of their own choosing. Leaving aside that is an argument that, if relevant, should be raised by the employees themselves (and not lie in the mouth of an employer) and no such employees have sought to participate (or participated) in these proceedings, in this case that argument rings hollow and is somewhat circular. The Union's argument is that it is the former employees of the former restaurant who have been laid off and should have been recalled to work in the new restaurant but for Richtree's (allegedly unlawful) refusal to recognize the Union and its collective agreement. I make no judgment on the merits of that Union argument at this point (and only observe it may be problematic in that it does not appear to be disputed that those former employees were terminated and paid the severance pay owing to them) – other than to note that there may be a contest between competing and pre-existing rights here. This decision only determines that the pre-existing bargaining rights of the Union have not been extinguished.

36. Lastly, I note that this decision is obviously based only on the evidence that the parties have chosen to put before me – the limited nature of the evidence may have occasionally raised more questions than it answered but I appreciate that was the presumably informed choice of the parties. However, having said that, this decision should not be taken as either an endorsement of or complimentary to the care, diligence or candour of either party in their presentation of what happened in the 2006 negotiations and the subsequent collective agreements – particularly with respect to the scope of the

Union's bargaining rights – when that was extremely germane to the issue they put in dispute before the Board.

37. As I have found that the Union bargaining rights continue to exist at the new restaurant (and only that – not what necessarily flows from that), the application is referred to the Registrar's office to be rescheduled for hearing of the balance of the allegations on the written request of either party if the parties are unable to resolve matters between themselves. I am not necessarily seized with the balance of the application.

"Bernard Fishbein"
for the Board