

*H*IGHLIGHTS

Ontario Labour Relations Board

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/June issue of the OLRB Reports. The full text of recent OLRB decisions is available on-line through the Canadian Legal Information Institute www.canlii.org.

Application for Certification – Reconsideration

– **Email** – Board issued a default decision on September 14, 2020, in which it certified the union for a bargaining of the employer’s employees – Board found employer was duly served with the application material by email, but failed to file a response – Employer sought reconsideration on basis that it did not review the email, and that the email address and website, referred to by the union and used for service, were no longer active – Union produced emails showing that employer used the email address before, after and around the time of the certification application – Union also produced evidence of a call made by the owner to a union representative around the time of the application – Timely processing of certification applications is critical in the construction industry – Moreover, Board held union was entitled to rely on email address posted on website, given that website was held out to the public for use on the date the certification application was delivered – Request for reconsideration dismissed.

2317672 Ontario Ltd. o/a Kawartha Hotwater Plus; RE: ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; OLRB Case No. 1247-20-R; Dated June 4, 2021; Panel: C. Michael Mitchell (11 pages)

Employment Standards Act – Farm Workers

Exemption – Employees making claims related to hours of work, overtime pay, public holiday pay, vacation pay and reprisal – Employer claimed employees were captured by exemption for farm employees under subsection 2(2) of Ontario Regulation 285/01 – Board found the employees were “employed on a farm” within the meaning of the Regulation, but that employment of two of the three employees was not “directly related to primary production” within the meaning of the Regulation – Language did not extend so far as to include land clearing activities, outside of the immediate growing season, where there was no guarantee that the activities would ever yield an agricultural product and where the policy reasons for the exemption did not apply – Board held the employer engaged in reprisal against one of the employees – Two Orders to Pay affirmed, one Order to Pay amended.

LEEVILLE ENTERPRISES LTD.; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: TYLER LOACH; RE: JUSTIN DALLAIRE; RE: JEFF JIBB; OLRB Case Nos. 1468-18-ES,

2142-18-ES, 3854-18-ES; Dated June 1, 2021; Panel: Kelly Waddingham (32 pages)

Occupational Health and Safety Act – Interim Order – Union filed an application for an interim order under section 98 of the *Labour Relations Act* – Underlying application appealed an inspector’s refusal to make an order under OHSA – Union asserted measures to protect health and safety of bus operators, with respect to COVID-19, were not sufficient – Specifically, union sought to have employer block or remove the two seats behind the driver’s seat and move or add a white line to at least 2 meters behind the driver’s seat – Board held that inspector’s decision not to make an order should be afforded deference – Union had not met onus that there was compelling or persuasive reason to interfere with inspector’s decision – Concept of erring on the side of protecting the health and safety of workers is built into OHSA, but adjudicators should not use the precautionary principle to substitute their personal opinions or preferences to prefer ambiguous or vague evidence - Application for interim order dismissed.

TORONTO TRANSIT COMMISSION; RE: AMALGAMATED TRANSIT UNION, LOCAL 113; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; OLRB Case No. 0420-21-IO; Dated: June 11, 2021; Panel: M. David Ross (14 pages)

Request for Reconsideration – Employment Standards Act – Farm Workers Exemption – Employer argued, *inter alia*, that Board decision “created obstacles for understanding and complying with” the Act and failed to follow *Rouge River Farms*, 2019 ONSC 3498 (Canlii) – Board noted that *Rouge River Farms* concerned the definition of “a farm” in relation to the location where work was performed – In instant case, Board considered the meaning of “primary production”, which involved a question of the timing of the work – Board had considered and addressed the policy underpinnings in its decision – Board decision may give rise to some administrative challenge, but such challenges did not justify depriving employees of

entitlements under the Act, and employers of all types are, in any event, routinely required to track employee hours and determine if and when employees are entitled to benefits mandated by the Act – Reconsideration request dismissed.

LEEVILLE ENTERPRISES LTD.; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: TYLER LOACH; RE: JUSTIN DALLAIRE; RE: JEFF JIBB; OLRB Case Nos. 1468-18-ES, 2142-18-ES, 3854-18-ES; Dated June 22, 2021; Panel: Kelly Waddingham (12 pages)

School Boards Collective Bargaining Act – Labour Relations Act – Unfair Labour Practice – Union alleged breach of the statutory freeze provisions under section 86 of the LRA and section 36 of the SBCBA, related to actions of various school boards following the repeal of Ontario Regulation 274/20 (Hiring Practices) – Board considered the freeze provisions vis-à-vis the two-tier structure of collective bargaining created by SBCBA, i.e., central and local bargaining – Board found and declared that school boards’ reaction to the revocation of the Regulation violated the statutory freeze under SBCBA – Breach involved a refusal to abide by terms and conditions of a Letter of Agreement between the parties, and decision to follow a Ministry of Education Policy and PPM 165 instead – Both policy and PPM contained caveat that Ministry expected all hiring decisions to be made in accordance with “this memorandum and in accordance with applicable laws, including the *Human Rights Code*, and with school board collective agreements” – No order for damages.

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF EDUCATION; RE: ELEMENTARY TEACHERS’ FEDERATION OF ONTARIO; RE: THE ONTARIO PUBLIC SCHOOL BOARDS’ ASSOCIATION; RE: VARIOUS DISTRICT SCHOOL BOARDS; OLRB Case Nos.: 1760-20-U, 1853-20-U, 1855-20-U, 1857-20-U, 1858-20-U, 1862-20-U, 1863-20-U, 1864-20-U, 1878-20-U, 1886-20-U, 1998-20-U, 2048-20-U, 2099-20-U,

2102-20-U, 2105-20-U; Dated June 4, 2021; Panel: Patrick Kelly (48 pages)

COURT PROCEEDINGS

Judicial Review – *Employment Standards Act* – Farm Worker Exemption – Applicant sought judicial review of a decision of the Board, in which the Board held that the farm worker exemption under section 2(2) of Ontario Regulation 284/01 did not apply to employees of the employer, poultry service workers, who worked solely at vaccinating pullets, providing services at multiple farms – Court concluded Board’s decision was reasonable – Evidentiary foundation before the Board did not support the employer’s submission – Board considered the purpose of the Act and the particular exemption in the regulation – Balance struck by the Board, between the purposes of the Act and the farm worker exemption, was not unreasonable – Application dismissed.

2317945 ONTARIO INC. CARRYING ON BUSINESS AS KD POULTRY; RE: CURTIS LAVIGNE; RE: JUSTIN FEARNES, RE: DAKOTA OLIVER; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 238/18; Dated June 21, 2021; Panel: Aston, Swinton, and Kristjanson JJ. (7 pages)

Judicial Review – *Employment Standards Act* – Severance Pay – Applicant sought judicial review of a decision of the Board, in which the Board determined that the calculation of payroll for the purpose of section 64 of the *Employment Standards Act* was limited to Ontario employment and operations – Court concluded Board’s decision was unreasonable – Court concluded: “... calculation of payroll under s.64 of the ESA is not restricted to Ontario employment; employment outside of Ontario, including employment outside of Canada, must be included” – Application allowed – Decision of Board set aside – Matter remitted to Board for determination of entitlement and other

remaining issues, with direction that calculation of payroll is not limited to either Ontario or Canadian payroll.

DOUG HAWKES; RE: MAX AICHER (NORTH AMERICA) LIMITED; RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. DC-19-249-0000-JR; Dated June 15, 2021; Panel: Dambrot, Lederer and Favreau J.J. (14 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7 th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Mammoet Canada Eastern Ltd. Divisional Court No. 609/21	2375-19-G	Pending
Candy E-Fong Fong Divisional Court No.	0038-21-ES	Pending
Eugene Laho Divisional Court No. 336/21	1869-20-U	February 9, 2022
Symphony Senior Living Inc. Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
AWC Manufacturing LP Divisional Court No. 304/21	1320-20-ES	Pending
Bomanite Toronto Ltd. Divisional Court No. 271/21	2057-19-G	February 3, 2022
Cambridge Pallet Ltd. Divisional Court No. 187/21	0946-20-UR	Pending
Kaydian Carney Divisional Court No. 110/21	1583-18-UR	October 7, 2021
Mir Hashmat Ali Divisional Court No. 275/20	0629-20-U	Pending
Guy Morin Divisional Court No. 20-DC-2622	(Ottawa) 2845-18-UR 0892-19-ES	Pending
KD Poultry Divisional Court No. 20-DC-2611	(Ottawa) 0618-19-ES 1683-19-ES 1684-19-ES 2165-19-ES	Dismissed
Paul Gemme Divisional Court No. 332/20	3337-19-U	November 25, 2021
Fortis Construction Group Inc. Divisional Court No. 395/20	1638-17-R	Dismissed
Aluma Systems Inc. Divisional Court No. 456/20	2739-18-JD	September 21, 2021
Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-2593	1226-19-ES	Pending
Joe Mancuso Divisional Court No. 28291/19	(Sudbury) 2499-16-U – 2505-16-U	Pending
Abdul Aziz Samad Divisional Court No. 019/20	3009-18-ES	Pending
Daniels Group Inc. Divisional Court No. 018/20	0279-16-R	Pending

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Community Care Access Centers Divisional Court No. 720/19	0085-16-PE 0094-16-PE	May 12-13, 2021
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
Kuehne + Nagel Ltd. Divisional Court No. 393/19	0433-18-R	Pending
New Horizon Court of Appeal No. C68664	0193-18-U	Dismissed
Doug Hawkes Divisional Court No. 249/19	3058-16-ES	Allowed
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Adjourned due to pandemic
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Adjourned due to pandemic
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	Allowed
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Adjourned due to pandemic
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Allowed
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Allowed
Myriam Michail Divisional Court No. 624/17 (London)	3434-15-U	Pending
Peter David Sinisa Sesek Divisional Court No. 93/16 (Brampton)	0297-15-ES	Pending
Byeongheon Lee Court of Appeal No. M48402	0095-15-UR	Pending
Byeongheon Lee Court of Appeal No. M48403	0015-15-U	Pending
R. J. Potomski Divisional Court No. 12/16 (London)	1615-15-UR 2437-15-UR 2466-15-UR	Pending

Qingrong Qiu Court of Appeal No. M48451	2714–13–ES	Pending
Valoggia Linguistique Divisional Court No. 15–2096 (Ottawa)	3205–13–ES	Pending