

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Aaron Hart, Solicitor
Andrea Bowker, Solicitor

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New Board Solicitor

Andrea Bowker returned to the Board in 2021 after nearly 25 years as a labour lawyer, in private practice, as in-house counsel and previously as Board Solicitor. Her practice has included regular appearances before the Board, private arbitrations and other tribunals. She is a graduate of the University of Toronto Law School and McMaster University.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in November of this year. These decisions will appear in the November/December 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.

Construction Industry – Certification – Status Disputes - Union challenged inclusion of an employee in the bargaining unit on the basis that he did not perform work in the construction industry or the work of a construction labourer on the application filing date – Employee attended a CPR training course on the application filing date – Employer paid the cost of the training course and his regular rate of pay for his attendance – Intervenor submitted that the employee was doing work of a construction labourer and the training

course was vital to those duties – Board takes a strict view of what constitutes being at work, namely actually performing the physical work of the bargaining unit on the day of application – Nothing in the pleadings of the parties links a CPR training course to anything specifically related to the work of construction labourers – Board stated there is no objective or inherent basis for stating that participation in a CPR training course is the work of a construction labourer nor is there a basis for distinguishing an employee at a CPR training course from an employee away for a day of vacation or sick leave – Board concluded the employee should be excluded from the bargaining unit – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE INZOLA CONSTRUCTION INC.; RE INZOLA SYMPHONY CORP.; RE THE INZOLA EMPLOYEE'S ASSOCIATION; OLRB Case No: 3447-19-R; Dated November 1, 2021; Panel: C. Michael Mitchell (10 pages)

Construction Industry – Grievance Referral - Referral of grievance under section 133 of the *Labour Relations Act, 1995* (the “Act”) - Union alleged the Employer failed to pay proper remittances in accordance with the Union's collective agreements by paying remittances based on “hours worked” rather than “hours earned” – Employer defended grievance on the basis of latent or patent ambiguity in the language of the collective agreements – Board concluded it could not take

judicial notice of the meaning of the term “hours earned” – As a matter of contract interpretation, the use of the two expressions in different articles and schedules of the collective agreements indicates an intention that each expression would have a different meaning – Board concluded the amount of a particular contribution is a function of the amount actually earned for each hour, or portion of hour worked – Therefore, “hours earned” in the context of the collective agreements is clear and unambiguous and refers to a multiple of the hours worked, determined based on the type of work (*e.g.*, straight time versus overtime where an employee may effectively “earn” two hours of straight time pay per one hour worked) – Given Board’s conclusion, there was no ambiguity in the collective agreements – Matter continues

JCL CONCRETE PUMPING LIMITED; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB Case No: 2148-19-G; Dated November 16, 2021; Panel: John D. Lewis (33 pages)

Construction Industry – Jurisdictional Dispute -

Employer sought to confirm its assignment of work related to the final assembly of Powered Air Purifier Respirators to non-Labourer trades – Labourers were previously assigned this work by the Employer – Board applied its normal criteria to conclude the Employer properly assigned the work – Employer and area practice favoured the Labourers who performed the work in dispute for approximately three continuous years on a previous project – Safety, skills and training criterion was neutral as there was no evidence any members of the Trades or the Labourers have different safety, skills and training than the other – Economy and efficiency criterion strongly favoured the Employer’s assignment of the work in dispute to the Trades – The work was previously performed by four crews of five labourers each but after the assignment to the Trades, the crews were reduced to four crews of three labourers each – Board found real gains in economy and efficiency, because the Trades perform the work during times in which they would otherwise be idle and would have to be

paid in any event, was a substantial consideration – Board concluded that the real and substantial savings that would accrue to the Employer under the current assignment of the work in dispute is sufficient to overcome the employer and area practice that favoured the Labourers - Application granted

BRUCE POWER LP; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 1059; RE: INTERNATIONAL BROTHERHOOD OF BOILERMAKERS LOCAL 128; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2222; RE: INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS LOCAL 95; RE: INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS LOCAL 736; RE: MILLWRIGHTS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1592; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793; RE: INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES LOCAL 1590; RE: SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 473; RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 527; OLRB Case No: 2756-20-JD; Dated November 15, 2021; Panel Jack J. Slaughter (11 pages)

Interim Relief – Unfair Labour Practice -

Application for an interim order under section 98 of the *Act* in which the Union sought to prevent the Employer from changing its current defined benefits pension plan to a defined contribution pension plan pending the outcome of its unfair labour practice complaint under section 96 of the *Act* – Board applied the factors established in the jurisprudence – Board concluded the strength of the Union’s position weighed in the Union’s favour – Board concluded the balance of harm and balance of convenience factor favoured the Union since the

defined benefits pensions plan was healthy at the time of the decision – Granting interim relief would better serve the interests of protecting Union’s status as the official bargaining agent as opposed to the harm it would cause the Employer if it had to delay the implementation of the defined benefit plan – The nature of relief sought favoured the Employer as the Union’s remedy was extraordinary in the circumstances – Urgency favoured the Union as the risk of erosion to the Union’s right to represent employees is imminent if it had to stand silently as the conversion to a defined contribution pension plan took place – Although the Employer’s financial position appears to be “a serious existential threat”, the defined benefit pension plan was healthy at the time of the decision – Board concluded that factors favoured issuing an interim order - Application granted

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; RE: INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 1542; RE: ARNPRIOR AEROSPACE INC.; OLRB Case No: 1185-21-IO; Dated November 8, 2021; Panel: Patrick Kelly (30 pages)

Sale of a business – Construction Industry - Application under section 1(4) and 69 of the *Labour Relations Act, 1995* – The responding party, VCDC, was bound to the Carpenters’ Provincial ICI Agreement, and had performed construction services but was no longer active in the construction industry having completed its last project in or about November 2018 – Union claimed VCDC was related to the other responding parties in a number of business initiatives in the construction industry – The responding parties conceded that all of the responding parties were separate entities under the common control and direction of AB – However, the Board was not persuaded that the non-VCDC responding parties were engaged in related businesses with VCDC – VCDC was the only responding party engaged in work in the construction industry as a general contractor – VCDC’s business was not the same

character of any of the responding parties as VCDC was never engaged in any of the types of activities or businesses performed by the other responding parties – VCDC and the other responding parties do not employ the same mode and means of production or similar types of employees or skills – Board concluded that VCDC and the other responding parties were not carrying on associated or related activities or businesses within the meaning of subsection 1(4) of the *Act* – Application dismissed

CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE: VIRTUS CONSTRUCTION & DEVELOPMENT CORPORATION; RE VIRTUS FINANCIAL GROUP OF COMPANIES INC.; RE: VIRTUS REAL ESTATE INVESTMENT TRUST LTD.; RE: WINCHESTER FINANCIAL CORPORATION; RE: WINCHESTER REAL ESTATE INVESTMENT TRUST LTD; RE: RALEIGH MANAGEMENT AND LEASING CORPORATION; RE: NORTHWOOD PARK PLAZA LTD.; RE: PARRY SOUND MALL INC.; RE: KIRKLAND LAKE MALL INC.; RE: 145 GOVERNMENT ROAD WEST LTD.; OLRB Case No: 3414-18-R; Dated November 4, 2021; Panel: Yvon Seveny (20 pages)

COURT PROCEEDINGS

Judicial Review – Duty of Fair Representation - Applicant sought judicial review of decisions of the Board in which the Board dismissed the Applicant’s duty of fair representation complaint on the basis of a 32-month delay in initiating the Board proceeding – Board concluded the Applicant’s choice to litigate the matter in another forum was not an acceptable explanation for the delay and that permitting the application to proceed would prejudice the Union – Divisional Court concluded the Board’s decision was reasonable – Application for judicial review dismissed.

PAUL GEMME; RE: UNITED STEELWORKERS LOCAL 9350; RE: TIMMINS & DISTRICT HOSPITAL; Divisional Court File

No. 332/20; Dated November 26, 2021; Panel: McWatt ACJSC, Coats, Favreau JJ (6 pages)

Judicial Review – Employment Standards Act -

Employer sought judicial review of Board's decision confirming an order of the Director of Employment Standards requiring the Employer to pay termination and severance pay – Employer terminated the employment of a 14-year employee after the employee sent threatening voicemail and text messages to a co-worker while away from the workplace and outside of working hours, while severely intoxicated - Employer regarded the misconduct as "willful" and did not pay the employee termination or severance pay under the *Employment Standards Act* – Board confirmed that the employee was entitled to termination pay and severance pay under the *Act* – Misconduct was serious but did not rise to the level of "willful misconduct" - Willful misconduct should not be understood as a mechanical identification of conduct as "misconduct", followed by an assessment of whether the employee had an "operating mind", but should involve an assessment of the entire context of the impugned behaviour, including the work and discipline history of the employee, the seriousness of the misconduct, the consequences of the misconduct, and any facts that would tend to explain to attenuate (or exacerbate) the employee's responsibility for the misconduct – Divisional Court reviewed the decision on a standard of reasonableness and concluded the Board decision was within the range of reasonable possible results – Board's findings were supported by evidence and were entitled to deference – The application was dismissed.

AWC MANUFACTURING LP; RE: AARON LAROCKE; RE DIRECTOR OF EMPLOYMENT STANDARDS; RE ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 304/21; Dated November 5, 2021; Panel: Corbett, Emery, Mew JJ. (3 pages)

Judicial Review – Health and Safety Reprisal complaint - Applicant sought judicial review of Board's decision dismissing reprisal complaint

under section 50 of the *Occupational Health and Safety Act* ("OHSA") because there was no nexus between the Applicant exercising her rights under OHSA and the termination of her employment – Board instead found the employer terminated the Applicant's employment for cause – Applicant argued the Vice Chair was biased and ought to have recused himself, and made rulings that were prejudicial to the Applicant's ability to present her case – Divisional Court concluded the Vice Chair's reasons for refusing to recuse himself were clear and compelling and that the Applicant had ample opportunity to prepare and present her case – Board's decision on the merits was reasonable – Application for judicial review dismissed.

KAYDIAN CARNEY; RE: ONTARIO LABOUR RELATIONS BOARD; RE: PETERBOROUGH REGIONAL HEALTH CENTRE; Divisional Court File No. 110/21; Dated November 19, 2021; Panel: Ashton, Corbett, Nishikawa JJ (3 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
Susan Johnston Divisional Court No. 934/21	0327-20-U	Pending
Reliable Choice Contract Inc. Divisional Court No. 915/21	0486-21-R	Pending
Royal Group Inc. Divisional Court No. 911/21	2440-20-U	Pending
Joe Placement Agency Divisional Court No. DC-21-00000017-0000 (London)	0857-21-ES	Pending
Holland, L.P. Divisional Court No. 673/21	2059-18-R 2469-18-R 2506-18-R 2577-18-R 0571-19-R 0615-19-R	June 21, 2022
Ontario Catholic School Trustees' Association Divisional Court No. 650/21	2067-20-M	May 24, 2022
Ontario Catholic School Trustees' Association Divisional Court No. 645/21	2067-20-M	May 24, 2022
PipeFlo Contracting Corp. Divisional Court No. 625/21	0170-21-G	Pending
Mammoet Canada Eastern Ltd. Divisional Court No. 609/21	2375-19-G	April 20, 2022
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	October 21, 2021
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	May 16, 2022
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
Paul Gemme Divisional Court No. 332/20	3337-19-U	November 25, 2021
Aluma Systems Inc. Divisional Court No. 456/20	2739-18-JD	Dismissed
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
Daniels Group Inc. Divisional Court No. 018/20	0279-16-R	Pending
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Pending
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	Leave to Appeal to CA granted – M52577
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	Pending
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Leave to Appeal to CA granted – M52413
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Leave to Appeal to CA granted – M52413
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