

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Aaron Hart, Solicitor
Andrea Bowker, Solicitor

February 2022

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January. These decisions will appear in the January/February 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.

Employment Standards Act – Limitation periods - Employer application for review brought under section 116 of the *Employment Standards Act* – Applicant sought to have Board reverse and set aside various orders in respect of the applicant’s contravention of subsection s. 5.1 of the ESA, which prohibits an employer from treating an employee as if the employee were not an employee – Employee’s claims under ESA filed beyond limitation period set out in the ESA - Employment Standards Officer applied the doctrine of fraudulent concealment to relieve against the application of the limitation period - Employee was a foreign-trained dentist seeking to become a dental assistant qualified to practice in Ontario – Employee worked for less than minimum wage at the Applicant’s dental office in order to become qualified to practice in Ontario, as an “intern” – Respondent was also improperly classified as an independent contractor and should have been treated by the Applicant as an employee – Applicant had claimed that employee was not legally entitled to work as an

employee of the Applicant – Employee clearly did work for the Applicant and thus should have been paid at least the statutory minimum wage – Board reviewed doctrine of fraudulent concealment and found it applicable to the employee’s situation - Applicant was in a position to accurately ascertain employee’s status and provide accurate information to employee, and did not – Appropriate to relieve against statutory time limit - Employee was entitled to be paid for all the work he did – Application dismissed

DR. DANESHVAR DENTISTRY PROFESSIONAL CORPORATION O/A D ON D DENTAL; RE QUMARS NADEMI; RE DIRECTOR OF EMPLOMENT STANDARDS; OLRB Case No: 0758-21-ES; Dated January 27, 2022; Panel: Derek L. Rogers (29 pages)

Construction Industry - Accreditation – In separate applications, GTSWCA sought to be accredited as the bargaining agent of all employers of construction labourers and operating engineers, respectively, employed in the sewers and watermain sector in a number of Board Areas and OASCA sought to be accredited as the bargaining agent of all employers of construction labourers and operating engineers, respectively, employed in the roads, sewer and watermain and heavy engineering sectors of the construction industry in Board Area No. 9 – In respect of construction labourers’ employer bargaining unit, Board considered GTSWCA bargaining unit first on agreement of the parties – Board must determine

whether that bargaining unit is viable for collective bargaining and considers the pattern of collective bargaining at the time the application is made - Lengthy history of the bargaining unit demonstrates that it is clearly viable - OASCA argued that GTWSCA bargaining unit does not reflect the pattern of collective bargaining because it is grounded on contractors based in Board Area 8, as opposed to having a geographic base within the scope of the Oshawa Signatories Agreement - GTSWCA argued that a single-sector bargaining unit is more appropriate than a multi-sector bargaining unit - Unit proposed by the GTSWCA is clearly appropriate for collective bargaining and reflects the pattern of collective bargaining existing at the time the application was made - Board found that either model could be appropriate for accreditation - OASCA and LIUNA Local 183's collective bargaining relationship should not be exempted from the GTSWCA's bargaining unit, as it would be antithetical to labour relations to have two competing accredited collective agreements covering exactly the same work - Board concluded that GTSWCA bargaining unit is appropriate for collective bargaining - Board also found GTSWCA operating engineers' employer bargaining unit appropriate - Shorter formalized history of collective bargaining but that pattern had existed *de facto* for some time - Matters continue

GREATER TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE THE OSHAWA AREA SIGNATORY CONTRACTORS ASSOCIATION; OLRB Case No: 0360-21-R, 0482-21-R, 0487-21-R, 0489-21-R, & 1239-21-R; Dated January 6, 2022; Panel: Jack J. Slaughter (12 pages)

Related Employer Application – Subcontracting

- Application under subsection 1(4) of the *Labour Relations Act* – Applicant union sought a declaration that the Respondents, T (a cleaning service) and DR (T's client and a municipality), constitute one employer for the limited purpose of adjudicating and enforcing the termination

grievances of two individuals formerly employed by T – Respondents contended that they do not carry on “associated or related activities or businesses”, and that their activities or businesses are not under “common control or direction” – T, a private janitorial service company, and DR, a municipality that provides public services, operated different “businesses” – T and DR carry on “associated or related activities” in respect of cleaning, because DR directly employed T to clean its headquarters – Despite the control exercised by DR pursuant to the terms of the commercial contract with T, T retained control over most labour relations matters as it they relate to the Applicant union – However, in the context of the discharge of the two individuals, DR stepped into T's role in respect of discipline – DR's conduct distinguished this case from the many cases in which the Board determined that the subcontracting relationship did not bring the entities within the ambit of subsection 1(4) of the Act – As between DR and T, there existed “centralized control of labour relations” in respect of the disciplinary actions taken against the two individuals – DR was clearly “calling the shots” in relation to the two discharged employees, and therefore was not in a genuine arms-length relationship with T – T and DR carried on related activities under common control – Board declared that T and DR are a single employer for the limited purpose of adjudicating and enforcing the individual termination grievances of the two individuals and matters incidental to the resolution of the grievances - Application granted

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE TOURE CLEANING SERVICES LTD; RE THE REGIONAL MUNICIPALITY OF DURHAM; OLRB Case No: 3094-19-R; Dated January 14, 2022; Panel: Kelly Waddingham (57 pages)

Unfair Labour Practice – Bargaining in bad faith

– Allegation that Responding Party misled union during central bargaining about the potential for the revocation of Regulation 274, which governed hiring practices of occasional teachers at English-language public school boards – Motion

brought by Responding Party to disqualify union counsel in view of his role in bargaining and certain events relevant to the Application – Test for removal of counsel is whether “a fair-minded reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the lawyer” – If permitted to appear on behalf of the union, counsel would be arguing about the meaning and effect of his own words as expressed in his communications during the central bargaining process – His submissions would also be informed by his own personal views – A party’s right to be represented by their counsel of choice is not an absolute right - Conflict between counsel’s obligation of objectivity and detachment owed to the Board, and his obligations to his client to present evidence in as favourable a light as possible – Three other co-counsel have been representing the union in the proceeding - Board exercised its discretion to direct the removal of counsel for the union pursuant to subsection 23(1) of the *Statutory Powers Procedure Act* – Matter continues

ELEMENTARY TEACHERS’ FEDERATION OF ONTARIO; RE **THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF EDUCATION**; RE THE ONTARIO PUBLIC SCHOOL BOARDS’ ASSOCIATION; OLRB Case No: 1760-20-U; Dated January 7, 2022; Panel: Patrick Kelly (21 pages)

Unfair Labour Practice – Duty of Fair Representation - Applicant employees alleged that union breached its duty of fair representation in respect of their employment with employer – Employer introduced COVID-19 vaccination policy, requiring employees to be fully vaccinated by a certain date – Union received legal advice and alerted employees that challenges to mandatory vaccination policies were unlikely to succeed in court – Applicants remained unvaccinated and were placed on unpaid leave – Union filed group grievance about Applicants’ placement on unpaid leave immediately upon request - Applicants argued that union should have communicated more

effectively with them, that the union should have challenged the employer’s policy earlier, and that the union was not taking enough action on the policy grievance (which was being held in abeyance pending developments in the case law) – Not arbitrary, discriminatory or in bad faith to await developments in case law after filing grievance - No *prima facie* case – Application dismissed

TIFFANY BLOOMFIELD, DANIELLE HURDING, MEL LEWIS, LEXI L. BEZZO AND JACLYN WAGNER; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA; OLRB Case No: 1586-21-U; Dated January 10, 2022; Panel: Lindsay Lawrence (8 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
City of Hamilton Divisional Court No. 967/21	1299-19-G 1303-19-G 1304-19-G	Pending
Manalco Contracting Ltd. Divisional Court No. 971/21	0295-14-R	Withdrawn
Susan Johnston Divisional Court No. 934/21	0327-20-U	Pending
Reliable Choice Contract Inc. Divisional Court No. 915/21	0486-21-R	February 14, 2022
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
Black and McDonald Ltd. Divisional Court No. 502/21	2425-20-G	April 6, 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
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
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
Mir Hashmat Ali Divisional Court No. 275/20	0629-20-U	Dismissed

(February 2022)

Guy Morin Divisional Court No. 20-DC-2622 (Ottawa)	2845-18-UR 0892-19-ES	Pending
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	April 5, 2022
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