

*H*IGHLIGHTS

Ontario Labour Relations Board

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April 2022

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April 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 – Application for Certification – Constitutional Law – Applicant applied for certification to represent labourers of the Responding Party Employer in the non-ICI sectors of the construction industry in Board Area 1 - Employer is a contractor in the telecommunications industry specializing in cable installation, maintenance and repair – One hundred per cent of Employer's work in Board Area 1 is performed for a single telecommunications client – With a minor exception one hundred per cent of the client's work is performed by the responding party employer – Responding party employer asserts that on the basis of derivative jurisdiction it is federally regulated and that the Board has no jurisdiction – Board found that there is no common management between the responding party employer and its client – Board found that employer is not engaged in the operation of its client's telecommunications service to its customers – Board found that relationship between employer and its client is not permanent – Board found that there is no

suspension in the telecommunications service when employer is performing its work – Board found employer has not discharged its onus to displace the presumption of provincial jurisdiction – Board found it has jurisdiction to determine the application – Matter continues.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE INTEGRATED MARKET SOLUTIONS INC., OLRB Case No: 1734-20-R; Dated March 10, 2022; Panel Thomas Kuttner (23 pages)

Construction industry – Grievance referral – Union filed grievance asserting that Remembrance Day was required to be observed as a paid holiday under collective agreement – Relevant collective agreement clause recognized list of holidays and concluded with "any other holiday proclaimed by the Provincial or Federal government – At the time the first collective agreement between the employer association and council of trade unions was negotiated in 1978, Remembrance Day was already a holiday proclaimed by the Federal government but had not been included in the list of holidays – Remembrance Day was neither observed by the employer, nor added to the list of holidays in any renewal collective agreement (as another holiday had been), nor had there been any grievances concerning Remembrance Day in the period of time from first collective agreement in 1978 to time of grievance in 2021 – Union argued that the collective agreement was clear on its face, and that Remembrance Day was plainly an "other holiday

proclaimed by the Federal government” – Union relied on recent arbitration decision (involving different parties and a different collective agreement, but a similar collective agreement clause) finding that National Day of Truth and Reconciliation was such an “other holiday” – Board found that purpose of collective agreement interpretation was to determine the “mutual and objective intentions” of the parties as expressed in the collective agreement language chosen – Surrounding circumstances and context of clause also had to be taken into account – At the time the collective agreement was initially negotiated, Remembrance Day was already a federal holiday and could easily have been included in the list of holidays in the collective agreement – The fact that no grievances had been filed despite holiday never being observed was also important context – Only reasonable interpretation in the circumstances is that the parties intended the “any other holiday” provision to apply to holidays proclaimed after the commencement of the collective agreement – Grievance dismissed.

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, AND THE FORMWORK COUNCIL OF ONTARIO; RE VERDI ALLIANCE GROUP OF COMPANIES, RE ONTARIO FORMWORK ASSOCIATION; OLRB Case No: 1682-21-G; Dated March 11, 2022; Panel: Patrick Kelly (13 pages)

Construction Industry – Jurisdictional Dispute

– Following a grievance filed by Ironworkers, the Applicant Carpenters filed a jurisdictional dispute regarding work sub-contracted by Eastern Construction Company Limited to Timmerman Timberworks Inc. - Timmerman is bound only to the Carpenters – Eastern is bound to the Ironworkers and to the Carpenters – Ironworkers assert that work assigned to Timmerman should have been assigned to its members – Ironworkers assert that the work in dispute is exactly the same as the work determined in an earlier jurisdictional dispute and asserts that the jurisdictional dispute application should be dismissed pursuant to the doctrines of issue estoppel, res judicata, and/or

abuse of process - Carpenters, Eastern and Timmerman state that there are significant differences between the earlier decision and the work in dispute such that the doctrine of res judicata, issue estoppel and abuse of process do not apply – Board found that the parties to this application and the earlier application are the same – Board considered whether the facts and arguments would be the same in the current application as in the application already decided – Board considered the typical jurisdictional dispute factors and held that the only factor which would be different would be the collective agreement factor, which would become neutral, and that the Board decision in the earlier application would not change – Board found that no labour relations purpose would be served by scheduling the proceeding for consultation – Board exercised discretion to dismiss application for abuse of process – Application dismissed.

CARPENTERS’ DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 721, EASTERN CONSTRUCTION COMPANY LTD., TIMMERMAN TIMBERWORKS INC.; OLRB Case No: 1183-21-JD; Dated March 8, 2022; Panel: Lee Shouldice (26 pages)

Employment Standards – Leaves

- Infectious Disease Emergency Leave – Employer sought review of Order to Pay requiring payment for paid infectious disease emergency leave (“paid IDEL”) days claimed by employee under section 50.1(1.2) of the *Employment Standards Act, 2000* (“ESA”) - Paid IDEL provisions of ESA allow for up to three days paid IDEL (of the lesser of \$200 or the amount the employee would have earned had she not taken the leave) if certain conditions are met, and in respect of individuals as set out in the ESA - Employee absent from work for two days to care for an individual identified in s. 50.1(8) of the ESA – Employer’s memorandum to staff indicated that employees entitled to short-term disability benefits

valued at \$200 or more per shift would not be entitled to paid IDEL – Employer denied paid IDEL on the basis that employee was entitled to short-term disability benefits under her employment contract and her entitlement to paid IDEL was therefore reduced to zero – DES noted in its submissions that the reasons for leave under the employment contract did not have to perfectly match reasons for leave under the ESA – Reference made to ESA Policy Manual which set out four criteria that must be met as of April 19, 2021 in order for an employee’s paid IDEL entitlement to be reduced – No dispute that employee was not entitled to payment under short-term disability plan for an absence necessitated by caring for another individual and not employee’s own illness – Board noted remedial purposes of ESA and appropriate principles of interpretation – Board found that an interpretation of the ESA that disentitled employees from paid IDEL in such circumstances rendered purpose of paid IDEL “pointless or futile” and was illogical – Board also found that short-term disability plan imposed a more onerous qualification than paid IDEL in that medical proof of “total disability” was required in order to support an absence of three or more days, and Employer retained the right to request medical evidence for an absence of two or fewer days – Board found that four criteria were not met such that the existence of the short-term disability plan was not a basis for reducing the employee’s paid IDEL – Application for review dismissed.

GRAND RIVER HOSPITAL CORPORATION; RE DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No: 1361-21-ES; Dated March 22, 2022; Panel: Derek L. Rogers (23 pages)

Sale of a business – Remedies – Contract for cleaning services at hospital (PH) transferred from CW to GDI – At time of transfer, CW was party to collective agreement with CUPE for the specific hospital location and GDI was party to city-wide collective agreement with LIUNA – No dispute that a sale of a business had occurred within the

meaning of s. 69.1 of the *Labour Relations Act, 1995* (the “Act”) - Dispute as to which collective agreement (and bargaining rights) would apply after transfer – PH part of larger amalgamated health care facility (UH) comprised of PH, SJHC and SMH hospitals - CUPE and previous provider had negotiated six successive collective agreements covering cleaners at PH since 2002 – CUPE also represented larger bargaining unit of UH employees including cleaners at SJHC and SMH’s main site – LIUNA represented cleaners employed by GDI at SMH satellite sites – CUPE had outstanding grievance pertaining to contracting-out of cleaning services at SMH satellite sites – LIUNA city-wide agreement covered approximately 32 locations and LIUNA and GDI also party to 28 additional collective agreements covering building services employees at approximately 36 locations – LIUNA and GDI had a separate collective agreement applicable to SMH satellite sites – City-wide agreement excluded employees covered by a subsisting collective agreement – All GDI employees at PH were former members of CUPE bargaining unit formerly employed by CW – CUPE argued that there was no conflict in bargaining rights because of exclusion in LIUNA city-wide agreement – LIUNA argued that exclusion did not apply because CUPE had no subsisting bargaining rights – LIUNA further argued that there had been intermingling of the business units even if there was no intermingling of employees – Board noted *Hallmark* decision setting out series of relevant principles to consider – As a result of s. 69(2) of the Act, GDI was bound to CUPE collective agreement unless the Board otherwise declared – Board concluded that it should exercise its discretion to preserve CUPE’s long-standing bargaining rights at PH – Board noted that existing bargaining structures should be preserved unless there are compelling reasons not to do so – GDI had multiple collective agreements to administer in any event – CUPE’s bargaining rights also to be considered in context of its broader bargaining relationship with UH of which PH was a part – There were no serious labour relations problems resulting from the status quo –

Speculation as to potential future problems was not a reason to disrupt existing bargaining structure – Board declared that GDI was bound by the collective agreement with CUPE – Application granted.

CANADIAN UNION OF PUBLIC EMPLOYEES;
RE **C&W FACILITY SERVICES CANADA INC.**, AND GDI INTEGRATED FACILITY SERVICES, RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; OLRB Case No: 1072-21-R; Dated March 23, 2022; Panel: Lindsay Lawrence (22 pages)

COURT PROCEEDINGS

Construction Industry – Application for Certification – Judicial Review – Application for judicial review of Board decision in a construction industry certification application in which the Board certified the Applicant union on a default basis after the Responding Party failed to file a response in a timely way - Responding Party filed a response by Xpresspost (rather than by e-filing as required by the Notice to Community on the Board's website) – Response was not received by the Board until approximately two weeks after the decision certifying the Applicant union – Responding Party asserted that it was not the employer of the individuals at issue - Responding Party subsequently filed a request for reconsideration, delivered by hand to the Board, which the Board declined to process because it was not e-filed - Board left it open to the Responding Party to file a fresh request for reconsideration - Subsequent request for reconsideration was dismissed on the basis that the Responding Party had not provided a sufficient explanation for the delay in filing the request, and that in any event the Responding Party had not sought to rely on new evidence that was not reasonably available to it previously, and that the Responding Party had not pleaded sufficient facts in support of its position that it was not the “true employer” of the employees at issue in the application - Court found that there was conflicting information provided to the

Responding Party in the Board's documents as to acceptable methods of filing since the Rules and the “Important Notes” on the Board form both referred to e-filing being optional, while the Notice to Community mandated e-filing - In view of the conflicting information and the Responding Party's efforts to file a Response Court concluded that it was procedurally unfair for the Board to not have considered the Responding Party's request for reconsideration on its merits – Request for reconsideration was remitted to another Vice-Chair of the Board for reconsideration on the merits – Application allowed

RELIABLE CHOICE CONTACT INC. O/A RELIABLE CHOICE PAINTING AND DRYWALL AND RELIABLE CHOICE CONTRACTING RE: ONTARIO COUNCIL OF INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES; Divisional Court File No. 915/21; Dated March 14, 2022; Panel: Backhouse J., Wilton-Siegel J. and Matheson J.; (10 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
Laksaman Fernando Mihinduklasuriya Divisional Court No. 079/22	1623-14-U 1738-14-ES	Pending
The Ontario Secondary School Teachers' Federation Divisional Court No. 187/22	0145-18-U 0149-18-U	Pending
Dr. Daneshvar Dentistry Professional Corporation Divisional Court No. 123/22	0758-21-ES	Pending
City of Hamilton Divisional Court No. 967/21	1299-19-G 1303-19-G 1304-19-G	December 12-13, 2022
Susan Johnston Divisional Court No. 934/21	0327-20-U	November 2, 2022
Reliable Choice Contract Inc. Divisional Court No. 915/21	0486-21-R	Judicial review allowed – March 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
Symphony Senior Living Inc. Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
Cambridge Pallet Ltd. Divisional Court No. 187/21	0946-20-UR	May 16, 2022
Guy Morin Divisional Court No. 20-DC-2622 (Ottawa)	2845-18-UR 0892-19-ES	September 15, 2022
Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-2593	1226-19-ES	Pending

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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 Court of Appeal No. C69929	2375-17-G 2375-17-G 2374-17-R	May 25, 2022
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 Court of Appeal No. C69933	3150-11-R 3643-11-R 4053-11-R	May 25, 2022
Ganeh Energy Services Divisional Court No. 515/17 Court of Appeal No. *****	3150-11-R 3643-11-R 4053-11-R	May 25, 2022
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