

*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 April 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.

Constitutional Law – Federal or provincial jurisdiction – Employment Standards – Appeal from Orders to Pay issued under the *Employment Standards Act* - Employer, a First Nation Band Council, took the position that it was federally regulated and therefore not subject to provincial employment standards regime – Employees in question worked at the Healing Lodge, an emergency shelter located on the Oneida Settlement – Healing Lodge operated by and under the supervision of the Band Council – Employer argued that the Healing Lodge was part of the services provided by the Band Council to its members and therefore federally regulated – DES took the position that presumptively, employment standards was provincially regulated – Function of providing emergency shelter services fell under provincial regulation – Board reviewed constitutional jurisprudence and applied “functional” test – Governance structure of Healing Lodge meant that its activities could not be separated from the activities of the Band Council

itself, so “functional” test was to be applied to the Band Council – Operation of the Healing Lodge was part of the normal and habitual activities of the Band Council – Presumption of provincial jurisdiction rebutted – Orders to Pay rescinded.

ONEIDA NATION OF THE THAMES, RE JESSICA DURKEE, RE TRACY GREEN, RE DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No: 1043-21-ES & 1047-21-ES; Dated April 27, 2022; Panel: Kelly Waddingham (19 pages)

Construction Industry – Voluntary recognition agreement (“VRA”) – Labourers signed VRA in 2018 with CDB – Carpenters disputed validity of 2018 VRA on the basis that they had signed VRA in 2015 with CDB – Labourers asserted 2018 VRA was valid and disputed validity of 2015 VRA as contrary to s. 66 and s. 53 of the *Labour Relations Act* (the “Act”) – Carpenters asserted 2015 VRA was valid based on jurisprudence and also that it settled outstanding litigation – 2015 VRA was result of certification application by the Carpenters against a joint venture that included CDB in 2015 in Board Area 20, but to which CDB itself was not a party – Discussions in respect of the certification application led to agreement in principle with CDB on the 2015 VRA which was province-wide, but was never signed and clear terms and conditions of employment were never finalized – In 2018, CDB carried out the Pontypool Bridge project in Board Area 9 using workers supplied by a labour supplier rather than by the Carpenters - In 2018, Carpenters supplied workers to work on CDB’s Mississippi

Bridge project – At the same time, CDB was attempting to secure work on Talbot Dam in Board Area 9 – CDB was required to have a collective agreement with the Labourers in order to work on that project – Labourers and CDB signed VRA exempting Mississippi Bridge and Pontypool Bridge projects – Board reviewed VRA jurisprudence and found that 2015 VRA was not valid because there was no specific intention to supply labour to any particular project in the near future and no actual supply of labour for 2 ½ years after agreement in principle reached – 2015 VRA therefore not a valid pre-hire agreement – 2015 VRA also not the settlement of the certification application – Labourers' 2018 VRA also not valid since at the time it was signed, CDB employed workers at the Pontypool and Mississippi projects – Exempting those projects from the scope of the VRA did not make the VRA a valid pre-hire agreement – Board declined to “read down” the 2015 and 2018 VRAs to the extent of their invalidity – Applications to strike down 2018 VRA granted – Application to enforce 2015 VRA as a settlement of a proceeding before the Board dismissed.

CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, RE **CONSTRUCTION DEMATHIEU & BARD (CDB) INC.**, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 607, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 625, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1036, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089, RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183.; OLRB Case Nos: 1923-

18-U, 1924-18-R, & 2233-18-U; Dated April 19, 2022; Panel: C. Michael Mitchell (51pages)

Occupational Health And Safety – Appeal of Inspector's refusal to make an order – Employee complained that Employer's mandatory COVID-19 vaccination policy contravened s. 63(2) of the *Occupational Health and Safety Act* (the “Act”) by requiring workers to disclose their vaccination status without their consent – Inspector declined to make order, and appeal ensued – Policy required employees to be vaccinated against COVID-19 by a certain date and required disclosure of their vaccination status to the employer – Vaccination policy contained exemptions for human rights accommodation – Section 63(2) of the Act prohibited employers from accessing health records except by order of a court or tribunal, or to comply with another statute – Regulation under *Reopening Ontario (A Flexible Response to COVID-19) Act* required employer to operate in accordance with advice received from Chief or local Medical Officers of Health – Local Medical Officer of Health had issued recommendations applicable to employer which included recommendation that vaccination policies include requirement that employees to show proof of vaccination status – Compliance with recommendations was voluntary – Board noted that scope of appeal did not include assessing vaccination policy or its consequences, but strictly related to the interpretation and application of s. 63(2) of the Act – No violation as employer did not seek to gain access to employee's health record without her consent – Board also concluded that access was authorized by statute – Statute did not prohibit employer asking for vaccination status but instead prohibited employer from seeking to gain access through other means without employee's consent – Appeal dismissed.

HEATHER WONG, RE **TORONTO PUBLIC LIBRARY**, RE A DIRECTOR UNDER THE *OCCUPATIONAL HEALTH AND SAFETY ACT*, RE CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB Case No: 1535-21-HS; Dated April 21, 2022; Panel: Derek L. Rogers (19 pages)

Termination Of Bargaining Rights – Section 63 application – Unfair labour practice – Union alleged that application for termination of bargaining rights under s. 63 of the *Labour Relations Act* (the “Act”) was tainted by employer initiation and/or threats, coercion or intimidation – Employer permitted various anti-union meetings to be held on company property during working hours – Employer’s plant foreman repeatedly expressed views to employees that the employees would be better off without the Union – Union representatives “ambushed” at one meeting by virtually all day and night shift employees present despite Union’s statement to Employer that its representatives expected to meet with only two employees and did not endorse the meeting – Employer was aware that employee had orchestrated a much larger meeting, for the purposes of berating the Union, than expected by Union – Union’s witnesses’ evidence that foreman had repeatedly told them and others that they would be better off without a union was more credible than foreman’s denials – Employer’s night shift supervisor permitted two meetings to be conducted by anti-union employees on company time and premises, for the purposes of organizing against the Union, when its normal procedure was not to allow such meetings to occur on company time – Cumulative effect of all these events was to demonstrate that the employer facilitated the filing of the termination application – Adverse inferences drawn by failure to call various key individuals as witnesses – Application dismissed.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 47, RE **AMBICO LIMITED**; OLRB Case Nos: 0576-21-U & 0953-21-R; Dated April 25, 2022; Panel: Maurice A. Green (27 pages)

Unfair Labour Practice – Duty to bargain in good faith – ETFO asserted that Crown and OPSBA’s failure to disclose in bargaining an intention to revoke O. Reg. 274/12 (“Reg 274”) related to hiring practices constituted a violation of the duty to bargain in good faith - Reg 274 set out a seniority

and qualifications-based mechanism for the hiring of long-term occasional (“LTO”) and permanent teachers – Letter of Agreement (“LOA”) forming part of collective agreement provided that hiring of LTOs and permanent teachers would be carried out in accordance with Reg 274, and was only reference to Reg 274 in the collective agreement – Crown and OPSBA proposed deletion of LOA – Lead Crown negotiator asked if Crown intended to revoke Reg 274, to which response was “not at this time” – ETFO proposed incorporating the language of Reg 274 directly into the collective agreement – Crown later proposed amendments to Reg 274 in the course of bargaining, which were unacceptable to ETFO – Negotiations ultimately resulted in ETFO withdrawing its proposals and parties agreeing to delete the LOA from the collective agreement – Crown then proposed side letter that explicitly confirmed that the parties could not reach agreement on Reg 274 but that this did not diminish the Crown’s right to amend or revoke Reg 274 – Multiple drafts of side letter ensued – Parties eventually agreed to a letter indicating that the Crown retained regulatory authority and that Reg 274 was not included in the “status quo items” in the memorandum of settlement for a collective agreement – Memorandum did not include any reference to Reg 274 – Several months later, after ratification of central terms, Reg 274 revoked – ETFO argued that Crown’s conduct led it to believe that while Reg 274 might be amended, it would not be revoked, violating s. 32 of the *School Boards Collective Bargaining Act* (the “Act”) which imposed a duty to bargain in good faith on the Crown – Crown argued that content of its proposals and the conclusion of central bargaining made it clear that there was no guarantee of Reg 274’s survival – OPSBA argued that Crown and OPSBA had made clear their objective to have the seniority-based regime in Reg 274 give way to considerations of diversity and qualifications as well as teacher mobility – Side letter intended to make Crown and OPSBA’s position clear and ETFO did not seek to return to the bargaining table in the face of the side letter – Board concluded that ETFO’s proposals to enshrine the provisions of Reg 274 into the terms

of the collective agreement indicated awareness that Reg 274 could be at risk – Nothing the Crown or OPSBA did in bargaining provided assurance to ETFO that the Crown would not exercise its regulatory authority, or that such authority was limited to amendments and not revocation – No evidence that Crown had formed the intention to revoke Reg 274 at the time of central bargaining – No violation of duty to bargain in good faith – Board also found that neither s. 70 nor s. 86 of the *Labour Relations Act* were violated – Application dismissed.

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 April 25, 2022; Panel: Patrick Kelly (33 pages)

Unfair Labour Practice – Interference with union – Intimidation and coercion Access to workplace – Union filed unfair labour practice alleging violations of s. 70 and 76 of the *Labour Relations Act* (the “Act”) - Employer implemented policy of excluding visitors from long-term care and retirement homes due to COVID-19, including union representatives, pursuant to Directive #3 issued by the Ontario Chief Medical Officer of Health – Clause in collective agreement permitted reasonable access for the purpose of meetings with members or servicing - Policy varied over time regarding whether, or how many, visitors were permitted to residents but consistently provided that union representatives were not permitted access except that they were permitted access at one point to conduct in-person ratification meetings - Union argued that there was no basis for denying access to the Union when residents were permitted visits from visitors, entertainers were on the properties, and residents were also leaving the facilities for outings – Employer argued that residents’ health and safety was primary concern and that the Union never had unfettered access to its properties – Board noted that Directive #3 by the time of the dispute between the Union and the Employer

permitted “general visitors” to access the properties and the Employer had allowed union representatives to attend for the purpose of a ratification vote – Blanket refusal to consider access to properties for union representatives for other purposes, while allowing access for ratification votes, indicated that Employer had some other motivation for denying access – No explanation was provided – Employer interfered with Union administration and representation – Access via videoconference not an acceptable substitute – On-site presence of union representatives critical to effective representation – Precautionary principle also did not justify blanket exclusion in view of activities on and off property that were permitted by the Employer – No intimidation or coercion found – Application granted.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1 CANADA, RE **CHARTWELL RETIREMENT RESIDENCE (VARIOUS LOCATIONS)**; OLRB Case No: 1237-21-U; Panel: Derek L. Rogers; (81 pages)

COURT PROCEEDINGS

Construction Industry – Grievance referral – Judicial Review – Application for judicial review of a Board decision in a construction industry grievance referral in which the Board allowed the grievance – Board concluded that the Employer violated the collective agreement when it laid off a foreperson who was not the most junior – Board concluded that the collective agreement required the Employer to lay forepersons off in reverse order of seniority and that provision relied on by Employer was not sufficient to confiscate seniority rights that were previously accorded to forepersons – Board dismissed request for reconsideration – Court noted that labour arbitrators and boards should be afforded the highest degree of deference in their interpretations of collective agreements – Court concluded that Board’s reasons were transparent and intelligible, demonstrating a sound grasp of the law, the content and context of the collective agreement, and the dynamics of labour

relations – unique to the construction industry –
Reconsideration decision similarly transparent and
intelligible and clearly addressed the Employer's
arguments – Application for judicial review
dismissed.

ELECTRICAL POWER SYSTEMS
CONSTRUCTION ASSOCIATION and **BLACK
AND MCDONALD LTD.** RE: LABOURERS'
INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL 506 and THE ONTARIO
LABOUR RELATIONS BOARD; Divisional
Court File No. 502/21; Dated April 14, 2022; Panel:
Sachs, Backhouse, and McCarthy JJ.; (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, 7th 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	April 3, 2023
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
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	Dismissed
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
Joe Mancuso Divisional Court No. 28291/19 (Sudbury)	2499-16-U – 2505-16-U	Pending

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Daniels Group Inc. Divisional Court No. 018/20	0279-16-R	June 8, 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. C69933	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