

*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 July/August 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 – Union applied for certification asserting that there were three job sites and 11 employees at work on the application filing date – Employer filed response asserting that there were no employees in the bargaining unit on the application filing date (and that all employees at work were in a different trade) and filing no list of employees – Employer asserted that work at one of the sites was maintenance and not construction – Once the Board determined that the work was at least partly construction, the Employer abandoned its position that the work performed was not bargaining unit work – Employer then sought to add additional names to the list, and argued that it had no obligation to advance an “alternative list” – Board reviewed its extensive case law on alternative positions being advanced by parties and concluded that s. 128.1(3) and s. 128.1(4) mandated that a responding party identify all individuals working in the bargaining unit on the application filing date, even if some of those individuals were advanced as alternative

positions by the responding party – Alternatively, s. 128.1(3) requires the responding party objectively to disclose all persons who are in the bargaining unit claimed by the union, and not simply the names who, in the responding party’s subjective primary position, were in the bargaining unit – Either approach requires the disclosure of alternative positions at the time the responding party files its response – Motion to add additional names denied – Matter continues.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, 2615194 ONTARIO INC., RE: **FOCUS FLOORING AND CONSTRUCTION INC.**; OLRB Case No: 2898-20-R; Dated July 28, 2022; Panel: C. Michael Mitchell (3 pages)

Construction industry – Jurisdictional Dispute – Dispute between Carpenters’ Union and Labourers’ Union over appropriate assignment of general tending work in respect of scaffolding as well as the movement of materials when the scaffold yard was moved – Review of “specialty contractor” exception as it relates to defining the relevant area practice – Specialty contractor exception led to giving excessive weight to the economy and efficiency factor by inserting it into the area practice evidence – Exception also led to shifting focus away from the nature of the work to the business nature of the contractor – Presumption remains that where a scaffolding job involves the contractor performing scaffolding on an “in and

out” basis, economy and efficiency factor favours the Carpenters – In this case, scaffolding work was performed on an in and out basis - Application of criteria results in a conclusion in this case that assignment of general tending work to Carpenters was appropriate – Assignment of general tending and movement of materials in relation to the movement of the scaffolding yard should have been assigned to Labourers – Application granted in part.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, RE **ALUMASAFWAY INC.**, ATURA POWER, E.S. FOX LTD., AND CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ITS LOCAL 249; OLRB Case No: 0697-21-JD; Dated July 12, 2022; Panel: David Ross (20 pages)

Unfair Labour Practice – Duty of Fair Representation – Remedies – In an earlier decision, the Board concluded that the duty of fair representation had been violated and directed the Union to file a grievance – Board further directed that any applicable time limits under the collective agreement were to be waived by the Employer – Employer had not participated in the original hearing despite having the right to do so – Employer applied for reconsideration in respect of the time limit issue – Employer argued that the Board did not have jurisdiction to direct the Employer to waive time limits as this power was within the exclusive jurisdiction of a labour arbitrator – Board concluded that on the specific facts of the case the Employer should have the right to seek reconsideration – Board concluded that it had the authority to direct waiver of time limits as part of its remedial order – Remedial authority set out in section 96(4) of the Labour Relations Act, 1995 (the “Act”) is broad and the waiver of time limits is necessary to remedy the breach – Supreme Court of Canada’s decision in *Northern Regional Health Authority v. Horrocks* did not limit broad remedial authority and the exercise of that authority was not the same issue as what would be before a

labour arbitrator – Legislative intent to grant broad remedial authority to the Board was clear – Request for reconsideration dismissed.

KRISTOPHER DAVID HEMMINK, RE RYDING REGENCY MEAT PACKERS LTD., RE TEAMSTERS LOCAL UNION NO. 879; OLRB Case No: 2815-20-U; Dated July 5, 2022; Panel: John Martelli (11 pages)

Unfair Labour Practice – Interim Order – Interim Reinstatement – Union applied for an interim order, seeking reinstatement of several inside organizers not recalled from layoff during an organizing campaign and terminated – Employer maintained a seniority list and employees in question were terminated while more junior employees were recalled – Board applied the factors set out in *National Judicial Institute*, 2018 CanLII 51312 – Focus in this case on relative strength of each side’s case and irreparable harm – Union asserted that several managers were told of Union’s campaign – No declarations filed by individuals alleged to have been told – Two of the Employer’s declarations did not state whether the declarants were aware or not aware of the Union’s campaign – None of the declarations explained who made the decision to terminate the employees – Adverse inference drawn (only for the purpose of the interim relief application) in respect of Employer’s knowledge of the Union’s campaign – Employer’s declarations did not explain how terminated employees’ employment histories compared to other employees’ who were not terminated – Irreparable harm factor favoured the Union in view of the impact of the termination of inside organizers on the Union’s campaign and Employer did not plead any harm that would arise from reinstatement – Interim reinstatement order granted.

PUBLIC SERVICE ALLIANCE OF CANADA, RE ONTARIO GAMING GTA LIMITED PARTNERSHIP; OLRB Case No: 0645-22-IO; Dated July 5, 2022; Panel: Peigi Ross (23 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
1476247 Ontario Ltd. o/a De Grandis Concrete Pumping Divisional Court No. 401/22	0066-22-U	Pending
Elementary Teachers' Federation of Ontario Divisional Court No. 367/22	0145-18-U	Pending
Cheryl Mucci Divisional Court No. 134/22	1832-21-U	Pending
Michael Peterson, et al. Divisional Court No.	2301-21-R & 0046-22-R	Pending
Strasser & Lang Divisional Court No. 003/22	2301-21-R & 0046-22-R	Pending
Torque-Fab Inc. Divisional Court No.	0553-21-R	Pending
CTS (ASDE) INC. Divisional Court No. 295/22	0249-19-G 2580-19-G 2581-19-G	Pending
Aecon Group Inc. Divisional Court No. 301/22	1016-21-HS	Pending
Sleep Country Canada Divisional Court No.	1764-20-ES 2676-20-ES	Pending
Capital Sewer Services Inc. Divisional Court No. 280/22	1826-18-R	Pending
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
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	February 2, 2023

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Mammoet Canada Eastern Ltd. Divisional Court No. 609/21	2375-19-G	Dismissed
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
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
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