

*H*IGHLIGHTS

Ontario Labour Relations Board

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December 2022

NOTICES TO THE COMMUNITY

Parties are reminded that delivery of an application by e-mail is no longer a permitted method of delivery, except where consent is obtained. Please see the Board's August 19, 2022 Notice to Community, available on the Board's website.

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 – Application for Certification – Union filed application for certification in respect of certain sheet metal workers – Employer argued the application should be dismissed because Boone is not a construction employer under the Labour Relations Act (“Act”) – Employer submitted that the majority of its business consisted of wholesale distribution, only a small portion was sheet metal fabrication work, and employees never worked on construction sites – Employer argued that the work was not construction and that the workers were not commonly associated in work or bargaining with on-site employees – Union argued that there is a

line of Board jurisprudence where the Board found sheet metal workers engaged in off-site fabrication are employees within the meaning of s. 126(1) of the Act – Board reviewed its jurisprudence concerning off-site employees, particularly in relation to sheet metal work – Board found that crux of the issue is whether the off-site employees had to be “associated” with the Employer’s on-site employees, or if they could be “associated” with the on-site employees of some other contractor that eventually installs the sheet metal fabricated in the shop – Board concluded that for an off-site employee to be commonly associated in work or bargaining with on-site employees, the employer that is the target of the certification must also have on-site construction employees performing work connected to the work performed by off-site employees – Board found that off-site fabrication work and the workers who perform such work may be recognized as employees in various Sheet Metal agreements, but that is not determinative – Union’s interpretation could result in finding any manufacturer to be a construction employer without the requirement of having on-site employees at all – Board found that the Employer’s fabrication of products used by construction employees on construction sites does not create the necessary nexus between the off-site and on-site employees – Employer not performing work in the construction industry – Application for certification dismissed.

SHEET METAL WORKERS’
INTERNATIONAL ASSOCIATION, LOCAL 47,
RE: **BOONE PLUMBING AND HEATING
SUPPLY INC.**; OLRB Case No: 0286-21-R,

Dated: November 1, 2022; Panel: John D. Lewis (52 Pages)

Construction Industry – Grievance – Union filed grievance alleging that Employer failed to apply the provincial ICI Collective Agreement (the “ICI Agreement”) binding on the Union and Employer to certain work – Employer is a large-scale industrial refrigeration equipment fabricator and construction contractor – Employer took the position that the shop fabrication collective agreement applied, and not the ICI Agreement – Work in question was custom fabrication and assembly of pipe spools and valve assemblies to be used at a construction site – Employer argued that fabrication was outside the scope of the ICI Agreement, that the practice evidence was insufficiently clear or consistent and that the ICI Agreement simply allowed contractors to install the manufactured equipment at customer sites – Union argued that the ICI Agreement specifically identified the work in question as “construction work” to which the agreement applied and that there was a clear, consistent and very-long standing practice of interpreting the provincial agreement to include the work performed – Employer Association (ORAC) agreed with Union’s submissions - Board determined that work in question falls squarely within the parameters of the ICI Agreement, which referred to “custom fabrication” – Long-standing practice in the industry was to apply the ICI Agreement to this work – Grievance allowed.

CIMCO REFRIGERATION DIV. OF TOROMONT INDUSTRIES LTD., RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 787, RE: ONTARIO REFRIGERATION AND AIR CONDITIONING CONTRACTORS ASSOCIATION; OLRB Case No: 1568-20-G; Dated November 10, 2022; Panel: Michael McFadden (16 Pages)

Construction Industry – Grievance Referral – Unjust Dismissal – Employer was subcontractor to

residential builder – Site ban instituted in respect of grievor after he allegedly smoked marijuana on the job site – Employer unsuccessfully attempted to have site ban lifted and had no other work for the grievor – Union argued that Union argued that the termination of employment was without reasonable cause and that the Employer had violated s. 70 and 72 of the *Labour Relations Act* (the “Act”) by terminating him in response to his attempt to exercise rights under the collective agreement – Union argued that Employer had to establish reasonable cause for termination apart from site ban, and since it did not fully investigate the termination it could not do so - Board found that the builder instituted the site ban – Board reviewed the law concerning interaction between a third-party site ban and employer obligations under a collective agreement – Third-party site ban does not constitute an action of employer subject to just cause requirement – Board found the Employer did not discipline or discharge the Grievor without reasonable cause and did not exercise management rights in an arbitrary, discriminatory or bad faith manner – Employer only removed the Grievor from site to comply with the builder’s site ban – No violation of *Act* - Grievance dismissed.

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, RE: MAINFRAME DEVELOPMENTS INC./ 2219424 ONTARIO INC., RE: RESIDENTIAL FRAMING CONTRACTORS’ ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY INC.; OLRB Case No: 0198-19-G; Dated November 30, 2022; Panel: Kelly Waddingham (33 Pages)

Employment Standards – Set-off – Employer sought review of an order to pay – Employment Standards Officer concluded wages were improperly deducted from final pay of employee – Employer argued that the deductions were permissible under s. 13 of the *Employment Standards Act* (the “ESA”) – Deductions were to cover benefits and cell phone - Board reviewed jurisprudence governing whether a deduction is permissible – Board must be guided by purpose of the *ESA* in its determination, namely the remedial

nature of the *ESA* – Employer argued the deductions were made as result of agreement between parties – Employee argued that she verbally told the Employer to stop deductions prior to commencing a protected leave – Employer stated that it never received follow up written confirmation to stop the deduction – Board found the sole issue was whether the deductions were authorized under the *ESA* – No written authorization for either deduction – Employee’s employment contract did not authorize the Employer to deduct benefits – Contract contained an agreement to pay benefits, not authorization of deductions – Order to pay affirmed and application dismissed.

1591783 ONTARIO INC. O/A SUPERIOR HOME HEALTH CARE, RE: ALAYNA KOLLMAN, AND DIRECTOR OF EMPLOYMENT STANDARDS, RE; OLRB Case No. 0430-22-ES; Dated November 24, 2022, Panel: Michael McCrory (8 Pages)

Occupational Health and Safety Act – Reprisal

– Applicant worked for the Employer under a project agreement between the Union and the Employer – Applicant alleged that the Employer laid him off and did not recall him at an appropriate time as a reprisal, contrary to s. 50 of the Occupational Health and Safety Act (“*OHS*”) – Applicant testified that prior to his layoff he raised concerns about health and safety issues at the job site - Applicant argued it was not sufficient for the Employer to have a good business reason for the layoff – Board should conclude that the Employer was aware of the Applicant’s safety complaints and did not request him to return to the job as a result - Employer argued the Applicant was only laid off due to a shortage of work – Employer presented evidence which showed a line of decision-making to reduce the number of workers on staff due to project needs, and an explanation for why the Applicant was not requested when more workers were needed – Employer must demonstrate its decision to lay off was not connected to exercise of right under *OHS* or attempts to seek compliance with *OHS* – Board found the layoff decision, and

decision not to request the Applicant to return, was normal and within management rights – No causal connection between decision to lay off and to not request the Applicant to return and the Applicant’s raising of health and safety issues – Application dismissed.

DANIEL DALRYMPLE, RE: BRIDGING NORTH AMERICA, ALSO KNOWN AS BNA AND/OR BNA CA DFA INC., RE: INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 700; OLRB Case No: 1974-21-UR; Dated November 29, 2022; Panel: Brian Smeenck (17 Pages)

COURT PROCEEDINGS

Judicial Review - Construction Industry – Related Employer – Damages – Ontario Court of Appeal (ONCA) set aside Divisional Court decision and upheld original Board decisions - Unions filed a related employer application and a construction grievance against T. – The Board found T. and his former business were a single employer within the meaning of s. 1(4) of the *Labour Relations Act* (the “*Act*”), that T. was bound to a collective agreement with the Unions, and in the grievance proceeding, ordered damages in respect of T.’s violations of the collective agreement – Divisional Court quashed the Board’s decision as unreasonable – Divisional Court found there was no valid labour relations purpose to this related employer declaration – Divisional Court found this was not a case where an employer intentionally repositioned its business to avoid labour relations obligations – ONCA found the Board decisions were reasonable, applying the considerations set out in *Vavilov* – The Board decisions properly assessed the evidence and the parties’ submissions, and the potential impact on T. – A consideration of the relevant legal constraints reinforced the reasonableness of the decisions – S. 1(4) of the *Act* confers a broad discretion on the Board – Where the pre-conditions under s. 1(4) are met, the Board may make a related employer

declaration, and s. 1(4) does not expressly require other matters to be considered – The Divisional Court erred in its application of the reasonableness standard as set out in *Vavilov* and failed to show the requisite restraint and respect for the specialized expertise of the Board – The Board did consider whether there was a labour relations purpose for the single employer declaration, particularly the erosion of bargaining rights – It was not open to the Divisional Court to substitute its own opinion that there was no labour relations purpose – The Board properly considered s. 126(3) of the *Act* – The Divisional Court improperly made findings of fact that were not before the Board – ONCA further concluded that the Board’s damages award, which applied *Blouin Drywall*, was reasonable – Finally, ONCA concluded that the Divisional Court erred in refusing to remit the matters to the Board and instead substituting its own decision – Appeal allowed and Divisional Court decision set aside.

TURKIEWICZ (TOMASZ TURKIEWICZ CUSTOM MASONRY HOMES) RE: BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; Court of Appeal File No. C69929; Dated November 16, 2022; Panel: Gillese, Trotter, and Harvison Young JJ.A. (35 Pages)

Judicial Review – Related Employer – Sub-Contracting – Court of Appeal for Ontario (ONCA) set aside Divisional Court decision and upheld original Board decisions - Union filed application under s. 1(4) of the *Labour Relations Act* (the “*Act*”) against the Employer and three of its contractors – Board found the Employer and two of the contractors were related and issued a declaration under s. 1(4) – Board held the contracting out provisions under the collective agreement and settlement, and the ss. 1(4) and 69 analyses were separate and distinct – Board found the pre-conditions for a s. 1(4) declaration were met and there was a valid labour relations reason to issue the declaration in respect of two of the contractors – Divisional Court quashed the Board decision – Divisional Court concluded the Board’s decision failed to take into account the parties’

bargaining history, collective agreement, and the relevant letters of understanding which address the contracting out provisions – ONCA disagreed with the Divisional Court and upheld the original Board decision – ONCA found the Board decision was rational and logical – The pre-conditions for a single employer declaration were met and there was a valid labour relations purpose – The Board decision was tenable in light of the factual and legal constraints – The Board clearly identified the evidence, the parties’ submissions and labour relations concerns with the s. 1(4) declaration – S. 1(4) of the *Act* confers a broad discretion to the Board – The Board was informed by a significant body of jurisprudence – Divisional Court did not properly apply *Vavilov* and instead substituted its own findings – The Divisional Court should not have undertaken a de novo analysis, and did not properly assess the Board’s reasons – Appeal allowed and Divisional Court decision set aside, restoring Board’s Decision

ENERCARE HOME & COMMERCIAL SERVICES LIMITED PARTNERSHIP, RE: UNIFOR LOCAL 975; Court of Appeal File No. C69933; Dated: November 16, 2022; Panel: Gillese J.A Trotter, and Harvison Young JJ.A. (38 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
BGIS Global Integrated Solutions Canada LP Divisional Court No. 614/22	0598-22-R	Pending
Mina Malekzadeh Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	Pending
Temporary Personnel Solutions Divisional Court No. 529/22	3611-19-ES	Pending
Mulmer Services Ltd. Divisional Court No. 504/22	2852-20-MR	June 8, 2023
Simmering Kettle Inc. Divisional Court No. DC-22-00001329-00-JR - (Oshawa)	0012-22-ES	Pending
1476247 Ontario Ltd. o/a De Grandis Concrete Pumping Divisional Court No. 401/22	0066-22-U	April 25, 2023
Elementary Teachers' Federation of Ontario Divisional Court No. 367/22	0145-18-U	Pending
Michael Peterson, et al. Divisional Court No. 003/22	2301-21-R & 0046-22-R	December 5, 2022
Strasser & Lang Divisional Court No. 003/22	2301-21-R & 0046-22-R	December 5, 2022
CTS (ASDE) INC. Divisional Court No. 295/22	0249-19-G 2580-19-G 2581-19-G	January 30, 2023
Aecon Group Inc. Divisional Court No. 301/22	1016-21-HS	January 24, 2023
Sleep Country Canada Divisional Court No. 402/22	1764-20-ES 2676-20-ES	June 6, 2023
Capital Sewer Services Inc. Divisional Court No. 280/22	1826-18-R	May 30, 2023
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
Joe Placement Agency Divisional Court No. DC-21-00000017-0000 (London)	0857-21-ES	Pending

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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
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
Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-2593	1226-19-ES	Abandoned
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	Appeal granted
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	Appeal granted
Ganeh Energy Services Divisional Court No. 515/17 Court of Appeal No. C69933	3150-11-R 3643-11-R 4053-11-R	Appeal granted
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