

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January of this year. 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.

Certification – Construction Industry – Dependent Contractors – Dispute concerns status of three individuals hired to do drywall taping work – Union asserted they were dependent contractors and responding party asserted they were independent contractors – Board found that crew was not entrepreneurial business and none of the trappings of an independent contractor – Crew’s relationship was structured to ensure that no individual had a chance of profit or risk of loss and that no one benefited from the labour of others – Relationship of individuals to responding party was typical “labour only” scenario where individuals were supplying their labour to install responding party’s materials on responding party’s job site – Responding party’s intentions were not material to outcome – Individuals included in bargaining unit – Certificate issued

ONTARIO COUNCIL OF THE
INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, RE: **2260654 ONTARIO**

LTD. O/A D & G CONSTRUCTION, OLRB
Case No: 1982-20-R & 2140-20-U; Dated January
16, 2023; Panel: John D. Lewis (24 pages)

First Contract Arbitration – Construction Industry – Union sought first contract arbitration pursuant to s. 43 of the *Labour Relations Act, 1995* (the “*Act*”) and written reasons for the decision would be issued at a later date – Parties had met a number of times but failed to reach agreement, and a strike had commenced – Board satisfied that collective bargaining had been unsuccessful – Union argued that Employer’s failure to agree to a pattern agreement without reasonable justification demonstrated that Employer had adopted an uncompromising bargaining position without reasonable justification, one of the factors set out in s. 43(2) of the *Act* – Board concluded that Employer’s proposals constituted a significant departure from the pattern agreement without reasonable justification, in that its proposals would provide significant advantages over other contractors who were bound to that agreement – Among other things, Employer proposed to exclude significant work from the scope of the agreement, to not provide Union with notice of new projects, eliminating the WSIB reimbursement for pieceworkers, as well as considerably lower wages and other rates – Chronology of events also indicated that Employer had not acted in an expeditious manner – First contract arbitration directed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, RE: **MIRROR INTERIORS INC.**, OLRB Case No: 1614-20-FA; Dated January 26, 2023; Panel: Danna Morrison (28 Pages)

Jurisdictional Dispute – Construction Industry - Dispute involving the assignment of work for cutting and removal of the lower portion of electrical transmission towers – Labourers asserted that their members should have been assigned the work instead of members of CUSW - Board considered the usual factors, noting that employer practice, economy and efficiency, and safety/skills factor were neutral - Labourers argued that the work was demolition, which fell within their core jurisdiction – CUSW asserted that groundpersons covered by CUSW collective agreement performed skilled labour associated transmission towers – With respect to area practice, Labourers relied on several similar projects carried out in the same Board area, while there was no area practice evidence supporting the original assignment to CUSW – Board concluded that work was fundamentally manual labour and involving no electrical work since towers were already decommissioned - Such work typically performed by construction labourers – Area practice and collective agreement factors favoured the Labourers – Application allowed

CANADIAN UNION OF SKILLED WORKERS, RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL 837, AND **HYDRO ONE NETWORKS INC.**, RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, OLRB Case No: 1165-20-JD; Dated January 27, 2023; Panel: John D. Lewis (18 pages)

Successor Employer – Construction Industry – Union alleged a sale of a business from G to SI and/or SU – Union alleged that F was a key person

in the predecessor employer (G) and that his departure to work for SI/SU constituted a sale of part of G's business – F was hired by G as a business development manager and ultimately rose to become chief operating officer and a shareholder in G – F became main point of contact for and managed relationship with two of G's biggest clients in the pipeline and railway sectors, to the exclusion of G's founder, B, although B remained the ultimate controlling mind of G – When F and his management team left to join SI/SU, to perform essentially the same work, key clients of G left with them – F was a key person due to his significant control over day-to-day decision making as well as being key point of contact for some of G's largest clients – F and team became key part of SI/SU's business, with clients relying on F and team's work and reputation from their time at G - G's business was seriously disrupted, with substantial job and revenue losses as a result of F and team departing – Effect the same as if G had sold its pipeline and railway divisions to SI/SU – Board concluded that there was a sale of part of G's business to SI/SU – Application granted

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 402, RE: **GRID LINK CORP.**, STAAL IRRIGATION INCORPORATED O/A STAAL IRRIGATION & CONTRACTING AND/OR STAAL UTILITY INC., OLRB Case No: 0309-20-R; Dated January 27, 2023; Panel: C. Michael Mitchell (27 Pages)

Successor Employer – Related Employer - Union filed application asserting that SB and SH constitute a single employer under the *Labour Relations Act, 1995* (the “*Act*”) and that there had been a sale of business from SB to SH within the meaning of the *Act* – In a previous decision, the Board determined that SB and SH were a single employer within the meaning of the *Employment Standards Act* (“*ESA*”), which at the relevant time required that the intent or effect of the related activities and businesses being carried on by an employer and other entities was to defeat the

purposes of the *ESA* – Union argued that the standard for a single employer declaration under the *LRA* was lower than what had been required by the *ESA* – Board dismissed sale of a business application as SH, a holding company, did not carry on the business of SB, which was a bakery – Board applied its long-standing case law that a single employer declaration was for the purpose of protecting bargaining rights from erosion, not for the purpose of collecting on an outstanding debt – Application dismissed

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 175, RE: **SILVERSTEIN'S BAKERY LIMITED**, AND SILVERSTEIN'S HOLDINGS INC., OLRB Case No: 1717-16-R; Dated January 9, 2023; Panel: Lindsay Lawrence (12 Pages)

COURT PROCEEDINGS

Judicial Review – Occupational Health and Safety – Application for judicial review of a Board decision dismissing an appeal of an inspector's refusal to make an order under the Occupational Health and Safety Act (the "OHSA") – Issue whether or not section 150 of O. Reg 213/91 to the OHSA requires that a worker hold a certificate of qualification as a "hoisting engineer-mobile crane operator 1" to operate a permanently installed, pendant operated overhead crane with a hoist capacity of 40 tons – In original and reconsideration decision, Board concluded that it did not – At the time the judicial review application was heard, the construction project was complete, the responding party employer no longer operated the crane and the crane itself was now covered by industrial, not construction, regulation, which makes no reference to certificates of qualification – Divisional Court concluded there was no practical purpose to an order that the responding party employer assign different employees to operate the crane, which was no longer being used by the employer – Court therefore determined that application was moot – Court further concluded that there were no

exceptional circumstances warranting a hearing of the application despite it being moot – Court also considered merits of application and concluded that the Board's examination of the relevant statutory context produced a harmonious reading of s. 150(1) – Issues in case lie within the core of the Board's specialized expertise – Application dismissed.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, RE: **AECON GROUP INC.**, A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS AND ITS LOCAL 128, MILLWRIGHTS REGIONAL COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS AND ITS LOCALS 1007 AND 2309, AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67, and THE ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No: 301/22; Dated January 27, 2023; Panel: Backhouse, Matheson, and Kurz JJ (13 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
All Canada Crane Rental Corp. Divisional Court No. 037/23	1405-22-G	Pending
BGIS Global Integrated Solutions Canada LP Divisional Court No. 614/22	0598-22-R	March 15, 2023
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	April 3, 2021
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	Dismissed
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
Susan Johnston Divisional Court No. 934/21	0327-20-U	Motion for Leave to Appeal
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
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	April 25, 2023
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	Application for leave to appeal to Supreme Court of Canada
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	Application for leave to appeal to Supreme Court of Canada
Ganeh Energy Services Divisional Court No. 515/17 Court of Appeal No. C69933	3150-11-R 3643-11-R 4053-11-R	Application for leave to appeal to Supreme Court of Canada
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