

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

September 2023

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in August of this year. These decisions will appear in the September/October 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 – JURISDICTIONAL DISPUTE – STANDING –
Union brought complaint concerning assignment of work for construction project pursuant to section 99 of the *Labour Relations Act, 1995* (the “Act”) – Preliminary motion to dismiss application because the applicant of Carpenters had no bargaining rights with the contractor responding parties – Carpenters contended historical area practices and previous application of Carpenters’ agreement to the same work at the project supported its position regardless of absence of bargaining rights - Board declined to dismiss given that absence of bargaining rights may not be determinative – Collective bargaining relationships criterion alone not grounds to dismiss – Application adjourned pending outcome of sector dispute

CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ITS LOCAL 27, RE: AMICO

INFRASTRUCTURES INC., LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, AMICA SENIOR LIFESTYLES, RE: AMICA GLEN ABBEY INC.; OLRB Case No. 0243-23-JD; Dated August 31, 2023; Panel: Jack J. Slaughter (9 pages)

CONSTRUCTION INDUSTRY – JURISDICTIONAL DISPUTE – PARTIES –
Operating Engineers filed application pursuant to s. 99 of the *Labour Relations Act, 1995* (the “Act”) seeking to overturn assignment of demolition work made by Employer to LIUNA – OPG sought to be removed as a responding party on the basis that it was simply the owner and had no role in work assignment - OPG argued it was not a proper responding party because it merely contracted with the party that sub-contracted the work in dispute – Labourers and Operating Engineers argued that OPG should be a responding party because it is the ultimate source of work and holds power over how contractors operate – Operating Engineers argued that motion was barred by *res judicata* and issue estoppel – Board focused analysis on determining whether or not responding party was responsible for making work assignment – Board concluded that OPG acted as an owner, had no direct involvement in assignment of work, and should not be a responding party – Motion granted

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, RE: **DELSAN-AIM ENVIRONMENTAL SERVICES INC. AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA**, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS LOCAL 506, RE: ONTARIO ASSOCIATION OF DEMOLITION CONTRACTORS; OLRB Case No. 1880-22-JD; Dated August 3, 2023; Panel: Jesse Kugler (13 pages)

CERTIFICATION – CONSTRUCTION INDUSTRY – Union brought certification application for bargaining unit of construction labourers – Union asserted that the three individuals in dispute performed bargaining unit work for at least part of the application filing date – At issue was whether three individuals performed construction labourers' work or non-construction delivery work – Board determined that on application filing date, the three individuals loaded and delivered signs and cones in preparation for paving job scheduled to start the next day – Applicant argued delivery of essential material to construction sites should be considered "construction industry work" – Responding party argued that delivery is not work in the construction industry, irrespective of how crucial materials are to construction process – Board reviewed extensive case law in this area and confirmed that employees who only perform delivery functions on application filing date are not performing work in the construction industry – Individuals excluded from bargaining unit - Application dismissed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, RE: **BEAMISH CONSTRUCTION INC.**; OLRB Case No. 0898-21-R; Dated August 4, 2023; Panel: Jack J. Slaughter (16 pages)

CERTIFICATION – CONSTRUCTION INDUSTRY – Union brought certification application for a bargaining unit of labourers,

carpenters and carpenters' apprentices and operating engineers – Dispute over whether any operating engineers' work was performed on the application filing date - Union sought to include an individual, JW, who used telehandlers and mini-excavator machinery for at least part of the application filing date - Applicant asserted that both labourers and operating engineers operated telehandlers but that operation of excavators, including mini-excavators, is *prima facie* operating engineers' work – Where telehandler or excavator used to lift heavy load, worker is acting in capacity of an operating engineer, not labourer – Employer argued that the tasks JW carried out align more closely with roles of a construction labourer, emphasizing the nature of the tasks over the tools used to accomplish them – Board confirmed that issue was not which trade had a better claim to the work – Both types of equipment operated by both operating engineers and labourers – Board discussed precise nature of JW's duties on application filing date and reason for hire – Status depended on context in which the machinery was operated, rather than merely the act of operating – Work on application filing date of moving heavy objects was operating engineers' work and was hired to operate heavy equipment – Bargaining unit therefore included operating engineers - Matter continues pending outcome of section 1(4) application

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, RE: **DENNIS HOME CORPORATION AND/OR DENNIS CONSTRUCTION CORPORATION AND/OR 1969578 ONTARIO LTD.**; OLRB Case No. 0852-22-R; Dated August 4, 2023; Panel: Patrick Kelly (16 pages)

SALE OF BUSINESS – RELATED EMPLOYER – Union asserted a sale a business from OSS to GLSS within the meaning of section 69 of the *Labour Relations Act, 1995* (the "Act") OSS and GLSS had pre-existing corporate relationship in sewer services business – A pivotal

figure (FH) left OSS and joined GLSS – OSS and the Union argued that there was a business transfer based on corporate nexus, operational similarities, and FH’s significant role at both companies – Board acknowledged overlapping professional services used by both companies but did not view as critical factor – Board discounted claims of equipment sale and financial transfer due to lack of compelling evidence – FH found to have significant role at OSS and subsequent association with GLSS – Board concluded business transfer occurred due to transfer of essential economic components and managerial skills combined with corporate nexus – Application granted

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, RE: **GREAT LAKES SEWER SERVICES LTD.**, AND 2414002 ONTARIO LIMITED O/A ONSITE SEWER SERVICES; OLRB Case No. 0404-21-R; Dated August 8, 2023; Panel: Kelly Waddingham (81 pages)

COURT PROCEEDINGS

JUDICIAL REVIEW – EMPLOYMENT STANDARDS – Application for review of an employment standards officer’s decision concluding that TPS was the employer of certain employees working at AVE, a wholesale florist operation – TPS was a temporary help agency within the meaning of the *Employment Standards Act, 2000* (“ESA”) and supplied temporary employees to clients – TPS also entered into an agreement with T on behalf of “Subcontractor CBH”, pursuant to which T dispatched workers to TPS’s clients – TPS asserted that CBH was the employer of these workers, not TPS – Board analyzed documents and relationships and noted that AVE’s contract with TPS specified that workers assigned to AVE would be employed by TPS, and made no reference to subcontracting –

Board also found no difference between how “CBH workers” and “TPS workers” were treated by TPS – CBH testified that he had nothing to do with supplying temporary workers and had just permitted T to use him as a “front” for T to supply workers, in exchange for a payment from T – Board concluded that “Subcontractor CBH” was not a legitimate enterprise – In most respects TPS, not T, acted as the employer of the temporary workers – Board concluded that TPS was the employer of the employees and liable for their wages – TPS sought judicial review arguing that s. 74.3 of the ESA required a direct relationship between employer and employees for an employment relationship to exist, and arguing that Board’s findings concerning “Subcontractor CBH” were not reasonable – Court noted that Turkiewicz decision of the Ontario Court of Appeal required a reviewing court to have regard to the Board’s expertise – Court reviewed the statutory scheme and the Board’s interpretation of the ESA and found it to be reasonable – Nothing in s. 74.3 of the ESA required a “direct” relationship – Board’s conclusion that TPS was the employer within the meaning of s. 1(1) of the ESA was reasonable – Board’s conclusion that “Subcontractor CBH” was not a legitimate enterprise was reasonable – Board reasonably concluded that s. 74.3 addressed the relationship between a THA and its client, not the relationship among THAs as to which is the true employer – Application dismissed

2517906 ONTARIO INC. o/a TEMPORARY PERSONNEL SOLUTIONS, RE: ONTARIO LABOUR RELATIONS BOARD and the DIRECTOR OF EMPLOYMENT STANDARDS; Divisional Court File No. 529/22; Dated August 23, 2023; Panel: Sachs, Backhouse, and Schabas JJ (15 pages)

JUDICIAL REVIEW – SUCCESSOR EMPLOYER – Responding parties operated shuttle buses for UHN – Responding party M took over routes replacing SP – Interpretation of s 69.1 of the *Labour Relations Act, 1995* (the “Act”) –

Whether “services to premises” includes shuttle bus operations – Board reviewed principles of statutory interpretation – Legislation to be given large and liberal interpretation – Legislative interpretations ought not to produce absurd outcomes – Adjudicative expertise of Board informs how it should interpret home statutes – Words in statute coloured by statutory context – Shuttle buses were “servicing premises” – Board concluded that there had been a sale of a business – Court concluded that Board’s decision was reasonable – Decision did not unduly expand meaning of “building service provider” – Conclusion was consistent with the evidence of the shuttle bus drivers – No basis for a conclusion that the terms used in Employment Standards Act (“*ESA*”) must determine the scope of the Act – Board reasonably concluded that statutory objectives of *ESA* and the *Act* were not the same and terms did not have to be given “harmonious” meanings – Application dismissed

MULMER SERVICES LTD., RE:
LABOURERS’ INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 183 and ONTARIO
LABOUR RELATIONS BOARD; Divisional
Court File No. 504/22; Dated August 16, 2023;
Panel: McWatt A.C.J.S.C., Backhouse, and
Howard JJ (18 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
Robert Currie Divisional Court No. 365/23	0719-22-UR 1424-22-UR	Pending
RT HVAC Holdings Inc. Divisional Court No. 131/23	0721-21-R 0736-21-R	October 23, 2023
All Canada Crane Rental Corp. Divisional Court No. 037/23	1405-22-G	September 28, 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	Application dismissed
Mulmer Services Ltd. Divisional Court No. 504/22	2852-20-MR	Application dismissed
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	Motion for Leave to Appeal to Court of Appeal
Elementary Teachers' Federation of Ontario Divisional Court No. 367/22	0145-18-U	April 3, 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 to Court of Appeal
Joe Placement Agency Divisional Court No. DC-21-00000017-0000 (London)	0857-21-ES	November 22, 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

(September 2023)

RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
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
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