

*H*IGHLIGHTS

Ontario Labour Relations Board

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November 2023

NOTICE TO COMMUNITY

Holiday Season Board Schedule

The Board's Holiday operations schedule is attached and can be found 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 October 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.

dispute regarding whether the nurses were "employees" within the meaning of the *Act*, and therefore no question engaging section 114(2) was raised – Application dismissed

ONTARIO NURSES ASSOCIATION, RE: ONTARIO HOSPITAL ASSOCIATION, NORFOLK GENERAL HOSPITAL, ARNPRIOR REGIONAL HEALTH, HEADWATERS HEALTH CARE CENTRE, QUINTE HEALTH CARE, UNIVERSITY HEALTH NETWORK, SOUTHLAKE REGIONAL HEALTH CENTRE, WILLIAM OSLER HEALTH CENTRE, HALIBURTON HIGHLANDS HEALTH CENTRE; OLRB Case No. 2131-22-U & 2132-22-M; Dated October 16, 2023; Panel: Michael McCrory (11 pages)

Application Regarding Employee Status– Application for declaration under section 114(2) of the *Labour Relations Act, 1995* (the "*Act*") – Union sought declaration that the responding parties were the true employers of their agency nurses – Responding Parties argued that the Union's application did not engage section 114(2) of the *Act*, but was instead an attempt to have the Board determine whether the agency nurses form part of the Applicant's bargaining unit – Responding Parties did not dispute that the agency nurses were employees within the meaning of the *Act* – Board concluded that, based on the pleadings, the real issue in dispute was whether the agency nurses were in the Applicant's bargaining unit, and not a

Successor Employer – Bargaining Unit – Application filed under section 69 of the *Labour Relations Act, 1995* (the "*Act*") – Work formerly performed by employees of a subcontractor now performed by employees of the Employer – Subcontractor was party to a collective agreement with LIUNA, and the Employer was party to a collective agreement with CUPE – Parties agreed that there was a deemed sale of business pursuant to section 69.1 of the *Act* – CUPE asserted that there was intermingling of employees and that all of the employees ought to be included in its existing all-employee bargaining unit – LIUNA asserted that there was little interchange between the two groups of employees and that both its and CUPE's

bargaining rights should be maintained - Board determined that it should preserve the established bargaining structure unless there are compelling reasons to do otherwise – For a bargaining structure to be altered due to intermingling, the integration must be such that it calls into question the fundamental integrity of the bargaining units – Board found that while there was some side-by-side and sequential work being completed by members of the two bargaining units, there was no overlapping of duties sufficient to cause serious labour relations harm – Board did not find LIUNA's bargaining unit to be a "tiny minority" such that negotiations with it would cause labour relations hardship – Centralized workplace meetings and workplace policies did not support overturning LIUNA's bargaining rights – Application granted and Board declined to alter the existing bargaining unit structure

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 3000, RE: **THE KENSINGTON HEALTH CENTRE, AND NUTRA SERVICES, RESPONDING PARTIES, AND CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4599, INTERVENOR.**; OLRB Case No. 1581-22-R; Dated October 16, 2023; Panel: Roslyn McGilvery (22 pages)

Certification – Appropriate Bargaining Unit – Application for certification for a bargaining unit of Employer's sales employees, of which there were 11 – Union applied in the alternative for sales and maintenance employees – Employer argued that the proposed bargaining unit could not be appropriate and that the appropriate bargaining unit is one consisting of all 59 of its non-supervisory employees - Board considered several factors, including whether the proposed bargaining unit shares a community of interest, and the potential for serious labour relations difficulties – Board determined that neither of the Union's proposed bargaining units could be appropriate – Board noted a general aversion to fragmentation, which can lead to jurisdiction or inter-employee rivalries and organizational problems – Board outlined a

number of problems with the Union's proposed unit, including its small size, the functional interdependence of the sales staff with other staff, and the centralized source of work and management authority – Board found that the unit applied for was simply too small and its work overlapped with that of other employee groups too much to make it a viable, separate bargaining unit – The alternative proposed bargaining unit raised the same concerns – Board determined that the appropriate bargaining unit would be akin to the Employer's proposal of an all-employee bargaining unit – Union directed to make further submissions on the Employer's proposed bargaining unit description – Matter continues

UNITED FOOD AND COMMERCIAL WORKERS CANADA LOCAL 1006A, RE: **YMCA OF GREATER TORONTO AT COOPER KOO FAMILY YMCA**; OLRB Case No. 2443-22-R; Dated October 30, 2023; Panel: Brian Smeenck (32 pages)

Unfair Labour Practice – Practice And Procedure – Union filed unfair labour practice application under section 96 of the *Labour Relations Act, 1995* (the "*Act*") – Union alleged that the Employer terminated an employee contrary to sections 12.1, 70, 72, and 76 of the *Act* – Employer's general manager ("GM") gave evidence that she viewed surveillance video demonstrating that employee mishandled food in kitchen – GM recorded portions of the surveillance videos on her phone – Employer produced videos from GM's phone but not the original surveillance video – Union argued videos were inadmissible – Employer submitted test for admissibility was relevance and that videos were relevant to prove employment was not terminated for improper purpose – Union submitted videos were unreliable and inadmissible – Union argued it would not have the opportunity to cross-examine video technician regarding reliability of videos and videos only showed excerpt of a longer surveillance video – Union submitted prejudice it will suffer from admitting videos outweighed potential probative

value – Board noted that videos were recorded from a cell phone, were not the original surveillance video and could not be verified by person capable of doing so – Videos were selectively edited clips showing 10-15 seconds of a 24 hour surveillance video – Prejudicial effect of admitting the videos outweighed potential probative value – Evidence not admitted – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 30000 RE: **CITY VIEW RETIREMENT COMMUNITY**; OLRB Case No. 2210-22-U; Dated October 26, 2023, 2023; Panel: Robert W. Kitchen (6 pages)

Construction Industry – Unfair Labour Practice
Applicant employer bargaining agency alleged that Union and Employer violated sections 71, 140(1), and/or 162(2) of the *Labour Relations Act, 1995* (the “*Act*”) – Applicant alleged that Union and Employer violated the *Act* by entering into an agreements which set out exceptions to the hiring requirements of the Precast Agreement (an accredited agreement and a provincial agreement within the meaning of the *Act*) which were not negotiated with the Applicant - No basis for a finding that s. 71 of the *Act* was violated but the agreements contravened sections 140(1) and 162 since they established an “other agreement” separate (and different) from the Precast Agreement - of the *Act* and was therefore null and void to the extent they apply to work covered by the accredited or designated collective agreement – Application granted

ONTARIO PRECAST CONCRETE MANUFACTURERS' ASSOCIATION RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, AND ITS AFFILIATED LOCAL UNIONS 183, 493, 506, 607, 625, 837, 1036, 1059 AND 1089 (COLLECTIVELY LIUNA), AND **FABCON PRECAST, LLC.**;

OLRB Case No. 2384-21-U; Dated October 26, 2023; Panel: Danna Morrison (18 pages)

Union Access to Property – Union seeking access pursuant to s. 13 of the *Labour Relations Act, 1995* (the “*Act*”) to Magino Lodge Site located fourteen km from Magino Gold Mine at which the Employer's employees, whom the Union sought to organize, resided – Magino Lodge owned by the mine owner and not by the Employer - Union asserted that Employer controlled access to the Magino Lodge – Employees lived at Magino Lodge for up to twenty consecutive days at a time - Employer asserted that it neither owned nor controlled access to the Lodge – Mine owner submitted that it controlled access to the Lodge – Since parties agreed that Employer did not own the Magino Lodge, the question for the Board to determine is whether it controlled access to it – – Board noted that remoteness was not a condition precedent to ordering a direction under s. 13 and that employees' ability to leave the premises was not material - Employer's control of access over the Magino Lodge limited to placing workers on a reservation list – No evidence of the Employer being consulted with respect to presence of anyone at Magino Lodge or that it was delegated the right to control access – Submitting list of employees to stay in Magino Lodge did not amount to control of access – Employer had no right to control access of those employees it placed on reservation list nor did it have the ability to override any decision made at Magino Lodge gate or during the currency of an individual's residence – Employer did not control access to Magino Lodge – Application dismissed

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 RE: **ARGONAUT GOLD INCORPORATED** and SIGFUSSON NORTHERN LIMITED v COMPASS GROUP CANADA; OLRB Case No. 2715-22-M; Dated October 30, 2023; Panel: Derek L. Rogers (46 pages)

COURT PROCEEDINGS

Workplace Tribunals Library, 7th Floor, 505
University Avenue, Toronto.

Judicial Review – Construction Industry – Grievance Referral – Union referred grievance related to payment of room and board allowance – Dispute over interpretation of memorandum of agreement (“MOA”) settling renewal collective agreement together with existing collective agreement – Union asserted that documents together provided for both a daily and weekly room and board allowance – Employer asserted that provision in MOA was meant to replace all relevant language in the existing collective agreement – Board allowed grievance, concluding that MOA did not displace existing language except as explicitly provided - On judicial review, Employer argued that Board did not give the MOA’s terms their plain and ordinary meaning, that Board focused more on the context of bargaining than on the terms agreed to, and that Board improperly applied the interpretive principle that a specific term will prevail over a general one - Court noted Board’s expertise in arbitrating grievances arising from the construction industry – Court found that Board’s conclusion that MOA had not eliminated benefit set out in collective agreement was reasonable – Board’s conclusion, while having regard to the context, was ultimately rooted in the language agreed to – Board’s application of interpretive principle that a specific provision will prevail over a more general one was reasonable – Application dismissed

ALL CANADA CRANE RENTAL CORP., RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, ONTARIO ERECTORS ASSOCIATION INCORPORATED and ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 037/23; Dated October 13, 2023; Panel: Sachs, Gordon, and Schabas 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

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Bradford West Gwillimbury Public Library Divisional Court No. 611/23	1523-23-FA	Pending
Yiming (Jenny) Liu Divisional Court No. 465/23	0458-21-U	November 21, 2023
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	Dismissed Motion for Leave to Appeal to Court of Appeal
Mina Malekzadeh Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	Pending
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 Dismissed
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	Withdrawn
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

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EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
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