

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

December 2023

NOTICE TO COMMUNITY

New Vice-Chair

The Board welcomes **Rishi Bandhu** as a new full-time Vice-Chair.

Rishi Bandhu practiced labour and employment law exclusively since his call to the Ontario Bar in 2004. Prior to his appointment, Mr. Bandhu maintained a diverse litigation and solicitor practice representing employees and employers in matters relating to employment, human rights and labour law. Since 2018, Mr. Bandhu has served as an instructor at the University of Toronto's School of Continuing Education for Industrial and Labour Relations. He holds an undergraduate degree from the University of Toronto and a law degree from Osgoode Hall Law School at York University.

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.

Certification – Bar – Applicant had previously filed a displacement application that the Board

concluded was untimely and dismissed – Prior to dismissal, applicant filed the instant displacement application - Incumbent and employer argued the Board should bar the Applicant from pursuing displacement application pursuant to ss. 7(10) or 111(2)(k) of the *Labour Relations Act, 1995* (the “*Act*”), or refuse to entertain application pursuant to s. 111(3)(c) of the *Act* – Alternatively, the employer argued that the Board should apply s. 111(3)(a) of the *Act* to find that the first and second applications were filed at the same time, making the second application also untimely in accordance with the Board’s earlier decision – Board concluded there was no basis for applying s. 111(3)(a) of the *Act* - Board determined that the filing of the second application did not constitute withdrawal of the first application, and there was no other evidence that the Applicant intended to withdraw the first application, such that s. 7(10) was not applicable – With respect to refusing the application pursuant to ss. 111(2)(k) or 111(3)(c) of the *Act*, the relevant factors were that the employees’ wishes had not been revealed through a representation vote, the Applicant had not committed an abuse of process by filing multiple applications, and had not sought to avoid an unfavourable result – Request for a bar to be imposed denied – Application to proceed in the normal course

UNIFOR, RE: RESIDENCE INN BY
MARRIOTT TORONTO MARKHAM, RE:
THE UNITED BROTHERHOOD OF RETAIL,
FOOD, INDUSTRIAL AND SERVICE TRADES
INTERNATIONAL UNION; OLRB Case No.

0766-23-R; Dated November 3, 2023; Panel: Roslyn McGilvery (24 pages)

Construction Industry - Grievance – Subcontracting – Union alleged that RC violated no-subcontracting clause in collective agreement – RC owned and managed a retail mall, in which JRP was a retail store tenant – T was contracted by JRP to perform construction work on the premises leased by JRP – Previous mall owner had required its tenants to have construction work on mall property performed by union members, but RC removed this requirement from its lease agreements – Union had originally asserted that RC had violated collective agreement by engaging T to perform construction work, but then subsequently alleged that the violation resulted from RC contracting with JRP to perform construction work – Union argued that lease agreement constituted subcontracting to JRP – RC argued that the Union was seeking to improperly expand the scope of its grievance – RC had not been involved in selecting T, nor had it directed the construction work completed by T – There was no evidence that the construction work would provide a benefit to RC – RC provided a tenant allowance to JRP merely as an incentive for it to enter into a long-term lease agreement – Board held that there was no breach of the collective agreement regardless of whether the allegation involved a contract, or other engagement, with either T or JRP – For the Board to hold that the subcontracting provisions had been breached, RC would have had to have exercised control over the construction work – The term “engagement” in the agreement suggests a direct relationship between employer and contractor or subcontractor – RC as landlord, simply approved JRP’s choice of contractor via the lease agreement – Negotiation of terms on which a tenant may perform construction work on leased property is not equivalent to engaging a contractor to perform construction work – Grievance dismissed

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, RE: **RIOCAN**

HOLDINGS INC., RIOCAN MANAGEMENT INC. and RIOCAN REAL ESTATE INVESTMENT TRUST; OLRB Case No. 3547-19-G; Dated November 10, 2023; Panel: Caroline Rowan (20 pages)

Construction Industry – Grievance - Union filed referral of grievance against City - City argued the Board should refuse to accept referral pursuant to section 133(4) of the *Labour Relations Act, 1995* and defer to expedited arbitration process set out in agreement binding on City and various trade unions entered into after the amalgamation of the City – Union’s affiliated bargaining agent was a party to the agreement, but the Union was not – Board held that the Union was not bound to the agreement and there was therefore no other process to which the Board should defer – The local trade unions and their parent union were separate legal entities – Local union did not have authority to speak on behalf of Union – Union was not a named party and not signatory to the agreement, and there was no intention for Union to be bound to the Agreement – Referral accepted and matter to proceed before panel of the Board

IBEW CONSTRUCTION COUNCIL OF ONTARIO, RE: **CITY OF TORONTO**, RE: CANADIAN UNION OF PUBLIC EMPLOYEES - LOCAL 79 (CUPE LOCAL 79); OLRB Case No. 1386-23-G; Dated November 9, 2023; Panel: Neil Keating (11 pages)

Practice and Procedure – Certification – Union applied for certification in respect of a transportation services employer with no physical business premises in Ontario – Union attempted to serve application for certification at Employer’s principal place of business as found on its Corporate Profile Report – Location was empty with sign on door indicating that “ESC Corporation” had moved – Union did not leave application at this address but instead called ESC and was informed that the Employer was one of its

“entities” – ESC advised it could accept deliveries and gave a street address – Union delivered application to ESC’s facsimile number – No response filed within two days as required by the *Labour Relations Act, 1995* (the “*Act*”) – Employer eventually received application three days after it was sent – Employer argued ESC was not authorized to accept service on its behalf – Employer’s corporate profile report did not list any facsimile number, did not mention ESC, and did not provide an address for service – Board concluded that the Union could not rely on representations by an unknown person associated with ESC – Individual working for ESC with unknown position or authority cannot bind the Employer – In an application for certification, documents must be delivered to the responding party – Employer was not obliged to prove that it did not receive the application or that the fax did not go to an authorized representative – Board concluded that application was not delivered properly prior to filing with the Board – Board determined that time for delivery should be extended – length of delay was not long – Although Union did not exercise much, if any, due diligence in determining how delivery of the application could effectively be made to the Employer, its error was understandable – Delivery of application for certification was serious issue – Union would suffer prejudice if time for delivery not extended, while Employer would suffer little prejudice if time for delivery extended – Application deemed effectively delivered – Matter continues

AMALGAMATED TRANSIT UNION, LOCAL 846, RE: **RIVER NORTH TRANSIT, LLC**; OLRB Case No. 0145-23-R; Dated November 21, 2023; Panel: Brian Smeenck (22 pages)

Sale of Business – Single Employer – Key Person

- Union sought declaration pursuant to section 69 and/or section 1(4) of the *Labour Relations Act, 1995* (the “*Act*”) that there was a sale of business from T Inc. to D Inc., or a declaration that T Inc. and D Inc. were a single employer – Key issue to

be determined was whether a former employee of T Inc., D, who subsequently left T Inc. and founded D. Inc, had been a key person at T Inc. – Board determined that D was not a key person at T Inc. – There was no transfer of physical assets and D was not a personification of T Inc.’s business – D owned shares in T Inc. while it employed him, and he performed supervisory work – He did not, however, hold voting shares, was neither a director nor an officer, and did not exert any control over T Inc. – The fact that he was put on a performance improvement plan, where he was required to work under supervision, further indicated that he was not a key person – T Inc.’s operations were unaffected by D’s departure – Regarding s. 1(4) claim, Board held that there was no common control or direction – There was no evidence of an inter-relatedness of operations nor centralized labour relations control between the T Inc. and D. Inc. – T Inc. and D Inc. shared mutual clients and performed work in the same sectors and geographical areas, solely as competitors – Application dismissed

ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, RE: **THERMAL MECHANICAL SYSTEMS INCORPORATED** and **DELL MECHANICAL CONTRACTING INCORPORATED**; OLRB Case No. 1226-20-R; Dated November 7, 2023; Panel: Michael McCrory (21 pages)

COURT PROCEEDINGS

Judicial review – Construction Industry – Certification - Union applied for certification for construction bargaining unit, as well as an industrial bargaining unit, in respect of A, a division of R - R took the position that a “divisional” bargaining unit was not appropriate, and that the appropriate bargaining unit consisted of all of R’s employees, not just A’s employees – A was one of many divisions purchased by R, some

of which were already unionized, such that there were existing bargaining units consisting only of the employees of a division of R – Board found that division-based bargaining unit was appropriate in the circumstances – On judicial review, R argued that there was a presumption against a division-based bargaining unit, which the Board had ignored – R also argued that Board’s assessment that the bargaining unit would not cause “serious labour relations harm” was unreasonable – Court noted fundamental role of Board in determining an appropriate bargaining unit – Court found that there was no presumption against a division-based bargaining unit – Court concluded that R’s argument concerning labour relations harm was an invitation to the Court to re-weigh the evidence, which the Court would not do – Application dismissed

RT HVAC HOLDINGS INC., RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 787 AND THE ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 131/23; Dated November 22, 2023; Panel: Sachs, E. Stewart and Tzimas JJ (13 pages)

Judicial review – Duty of Fair Representation –

Delay – Applicant’s duty of fair representation complaint dismissed as making out no *prima facie* case for the remedies sought – Request for reconsideration also dismissed – Motion to permit the late filing of an application for judicial review, brought eight months beyond the 30-day time limit set out in the *Judicial Review Procedure Act* (“*JRPA*”) – Section 5(2) of the *JRPA* permits relief against the time limit where “there are apparent grounds for relief and no substantial prejudice or hardship will result” – in considering “apparent grounds for relief”, the Court is to consider the length of the delay and any explanation offered for it, as well as the substantive merits of the application for judicial review - Court found that

although some of the delay could be explained by the reasons offered by the Applicant, not all of the delay was satisfactorily explained – Substantial prejudice to Union and Employer given that the application to the Board concerned an arbitration concluded in 2020 that itself concerned events that took place in 2016 – Court also concluded that the application had little merit since the Applicant simply disagreed with the result of the arbitration award that gave rise to the application to the Board – Court declined to exercise its discretion to extend time limit – Motion dismissed

YIMING LIU, RE: ONTARIO LABOUR RELATIONS BOARD, HOLIDAY INN TORONTO DOWNTOWN CENTRE AND UNITE HERE LOCAL 75; Divisional Court File No. 465/23; Dated November 21, 2023; Before: Leiper, J (7 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
Bradford West Gwillimbury Public Library Divisional Court No. 611/23	1523-23-FA	September 10, 2024
Yiming (Jenny) Liu Divisional Court No. 465/23	0458-21-U	Dismissed
Robert Currie Divisional Court No. 365/23	0719-22-UR 1424-22-UR	Pending
Red N' Black Drywall Inc. Divisional Court No. 350/23	1278-19-R	March 5, 2024
RT HVAC Holdings Inc. Divisional Court No. 131/23	0721-21-R 0736-21-R	Dismissed
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
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
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

(December 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