

*H*IGHLIGHTS

Ontario Labour Relations Board

Editors: Andrea Bowker, Solicitor
Aaron Hart, Solicitor

November 2024

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.

Notice To Community – New Vice-Chair

The Board welcomes **Jerry Raso** as a new full-time Vice-Chair. **Jerry Raso** practiced labour and employment-related law since his call to the Bar in 1988. Prior to his appointment to the Board, he worked both in-house and in private practice representing unions. He has considerable experience appearing before the Board and other tribunals, with special expertise in construction labour relations.

Certification – Construction Industry – Practice and Procedure

– In its application for certification, Applicant brought a motion requesting that the Board hold Employer and Incumbent union in contempt on the basis of late production of documents – Applicant requested that Board strike the Employer and Incumbent's responses and set aside their voluntary recognition agreement as a result – Applicant argued that the Employer's and

Incumbent's conduct during the hearing had required the Applicant to defend no *prima facie* case motions twice without sufficiently disclosed materials – Applicant submitted that the late production ought to be seen as willful given the proximity in time to documents already produced and the fact that some of these late-produced documents required no new keyword searches – Incumbent and Employer argued that there was no basis for a contempt finding – Incumbent conceded that the documents should have been produced earlier but argued that it was at most the result of inadvertence or honest mistake – Employer additionally challenged the connection of the requested remedies to late production – Board dismissed the contempt motion – Board noted that contempt proceedings have always been considered a last resort and that the case law submitted by the Applicant enumerated a range of remedies for pre-hearing production problems other than finding parties in contempt – Board drew distinction between not being able to provide entirely satisfactory explanation for the delay and engaging in willful obstruction of the process – Board remarked that disallowing the tendering of the late production into evidence could have been a proportionate response to the matter but was not sought by the Applicant – Matter continues

CARPENTERS' DISTRICT COUNCIL OF
ONTARIO, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
RE: **THE IRONSTONE BUILDING
COMPANY INC.**, RE: LABOURERS'

INTERNATIONAL UNION OF NORTH AMERICA; OLRB Case No. 0538-19-R; Dated October 1, 2024; Panel: Michael McFadden (16 pages)

Construction Industry - Certification – In application for certification, the parties agreed that two workers were performing construction labourers' work on the date of application at S's job site but disagreed about whether S or another entity, GWM, was their employer – Union did not call the two workers as witnesses and S asked the Board to draw an adverse inference against the Union – The Board considered the *York Condominium* factors and found that GWM hired the workers, S had no input into remuneration, the workers perceived GWM as the employer and S did not intend to create a relationship of employer and employee, while GWM did intend to do so – The Board also found that the site coordinator, an employee of S, gave direction to the workers but that direction was minimal and did not detract from the overarching fundamental direction and control over the workers exercised by GWM – The Board drew an adverse inference against the Union as a result of the workers not testifying as contemplated by Information Bulletin No. 9 – The Board held that GWM was the true employer of the workers on the date of application – Application dismissed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, RE: **STYLUX HOMES INC.**; OLRB Case No. 1577-21-R; Dated October 7, 2024; Panel: Jack J. Slaughter (24 pages)

Construction Industry - Displacement Application – Applicant filed a displacement application for certification seeking to displace the Incumbent in respect of employees of the Employer – Incumbent took the position that the application should be dismissed on the basis that the four individuals employed by the Employer on the date of application were not members of the Applicant

in good standing and should therefore be excluded as contemplated by *April Waterproofing* – Incumbent submitted that three of the individuals' memberships had been suspended for unpaid dues and/or other fees and that the Incumbent had no record of the fourth individual being one of its members – Applicant submitted that the collective agreement did not require the Employer to hire members of the Incumbent, but merely required an individual to get a clearance slip by no later than the second Saturday following the first day of work – Board agreed with the Applicant – The Board found there was no evidence as to when the employees were hired and it was therefore not possible to conclude that any of them was hired contrary to the collective agreement – There was also no suggestion that the Employer was informed at any relevant time that the employees' memberships were suspended and that they were no longer members in good standing – The Board declined to draw an inference that the Employer knowingly breached the collective agreement for purposes which include the displacement of the Incumbent's bargaining rights – The Board held that the four individuals were employees in the bargaining unit for the purposes of this application and their ballots should be counted – Matter continues

MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY, RE: **MENDES MASONRY CONTRACTOR LTD.**, RE: **ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA**; OLRB Case No. 0179-22-R; Dated October 25, 2024; Panel: Caroline Rowan (22 pages)

Construction Industry – Sector Determination – Applicant sought a determination, pursuant to section 166 of the *Labour Relations Act, 1995*, of which sector of the construction industry a specific project was in – The project involved the construction of a large grid-connected electricity battery storage facility and the installation of self-

contained lithium-ion batteries – The project also involved the digging of storm sewers and water mains on site, as well as the installation of an outdoor electrical dual circuit substation in the centre of the project – Applicant, LIUNA, OPDC, IUOE, Local 793 and the UCAO, took the position that the project fell within the electrical power systems sector (“EPS”) – The ETBA submitted that the project fell within the ICI sector – Board held that the project fell within the EPS sector of the construction industry – Board considered the three sector dispute factors: end use, bargaining patterns and work characteristics – Board found the factor of end-use lent strong support to a finding that the project fell within the EPS sector as the project served to receive, store, and release electricity from and to the grid for the purpose of enhancing the reliability of Ontario’s electricity system – The factor of bargaining patterns was neutral as there were no established bargaining patterns and there was no “broad consensus” amongst contractors and the trades – Board found the factor of work characteristics favoured the EPS sector, but only slightly, and was by no means determinative – On balance, the Board held that the factors indicated that the project fell within the EPS sector

AECON UTILITIES INC., RE: UTILITY CONTRACTORS ASSOCIATION OF ONTARIO, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL, AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO, RE: CARPENTERS' REGIONAL COUNCIL, AND ELECTRICAL TRADE BARGAINING AGENCY, ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; OLRB Case No. 1621-23-R; Dated October 16, 2024; Panel: Jesse Kugler (19 pages)

Grievance – Unfair Labour Practice – Practice and Procedure – Union sought to amend grievance

referral under s. 133 of the *Labour Relations Act, 1995* (the “Act”) to allege that Employer had violated sections 70, 72, 76 and 87 of the Act in addition to the collective agreement – Grievance alleged that the Employer terminated the grievor without just cause – Union had already filed additional particulars and amended the grievance to include a claim of unlawful reprisal contrary to section 50 of the *Occupational Health and Safety Act* prior to this request – Employer argued that it would be prejudiced by Union’s attempt to improperly expand the scope of the Grievance which had already been responded to – Board declined to allow amendment - Union did not plead any facts that support a nexus between Grievor’s termination and the exercise of rights under sections 70, 72, 76 or 87 of the Act or explain how the pleaded facts could establish a violation of the Act – Board disagreed that the circumstances would not prejudice Employer and drew attention to the requirement of section 133 grievance referral for detailed pleadings – Board determined that it would be unfair and prejudicial for Employer to have to lead evidence in response to the new claim – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 625, RE: BNA CA DFA INC. O/A BRIDGING NORTH AMERICA; OLRB Case No. 0117-24-G; Dated October 7, 2024; Panel: Roslyn McGilvery (11 pages)

Jurisdictional Dispute – Practice and Procedure – GTSWCA sought intervenor status in a jurisdictional dispute between Labourers and UA – Work in dispute was within the electrical power systems (EPS) sector – UA submitted that GTSWCA is not accredited in the EPS sector and thus has no direct or substantive legal interest in the matter – Employer supported UA’s position, noting that the jurisdictional dispute arises from an allegation that the Employer violated the relevant EPS collective agreement, not a collective agreement binding on the GTSWCA – Labourers

submitted that GTSWCA derives its direct interest from that of a member Employer which was impacted by the actions of Employer – GTSWCA additionally submitted that it has the right to intervene in its capacity as an accredited association in the Board Area at issue and that it has extensive knowledge as to the past practice of its contractor members – Board found that GTSWCA did not establish a direct legal interest in the proceeding since it was not party to a collective agreement applicable to the work in dispute – Board also found it unnecessary to grant GTSWCA *amicus curiae* standing because Labourers could reasonably marshal evidence relevant to the GTSWCA collective agreement – Board stressed that it is appropriate to limit participation in jurisdictional disputes to parties with a direct legal interest given the inherent complexity of the matter – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183, RE: **E.S. FOX LIMITED**, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 401 AND GREATER TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION; OLRB Case No. 1036-24-JD; Dated October 22, 2024; Panel: Danna Morrison (12 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
Jitesh Parikh Divisional Court No. 409/24	0408-24-HS	January 21, 2025
Ahmad Mohammad Divisional Court No. 476/24	1576-20-U	Pending
Clean Water Works Divisional Court No. 401/24	1093-21-R	January 16, 2025
SkipTheDishes Divisional Court No. 378/24	0019-24-R	February 13, 2025
Bird Construction Company Divisional Court No. 363/24	1706-23-G	Pending
2469695 Ontario Inc. o/a Ultramar Divisional Court No. 278/24	1911-19-ES 1912-19-ES 1913-19-ES	March 3, 2025
Yan Gu Divisional Court No. 306/24	0994-23-U	December 12, 2024
Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario Divisional Court No. 131/24	2442-22-U	October 31, 2024
Four Seasons Site Development Divisional Court No. 661/23	0168-17-R	Dismissed
Mina Malekzadeh Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	Adjourned
Simmering Kettle Inc. Divisional Court No. DC-22-00001329-00-JR - (Oshawa)	0012-22-ES	Pending
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

(November 2024)

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