

H Ontario Labour Relations Board **HIGHLIGHTS**

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New Full-Time Vice-Chair

The Board welcomes a new full-time Vice-Chair, **Jesse Kugler**.

Jesse Kugler obtained his law degree from Queen's University in 2007 and was called to the Bar of the Law Society of Upper Canada in 2008. He thereafter practiced labour and employment law in one of Canada's premier boutique labour and employment firms. He resigned his partnership in that firm in 2021 to accept an appointment as Vice-Chair of the Ontario Labour Relations Board.

SCOPE NOTES

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

Application for Certification – Status Disputes – Managerial Exclusion – Employer challenged inclusion of one individual, the Head Scenic Painter, in the bargaining unit on the basis of subsection 1(3)(b) of the *Labour Relations Act, 1995*, and on the basis that she fell outside the scope of the applicant's proposed bargaining unit (i.e., by virtue of occupying a position higher in rank than

“working supervisor”) – Board considered the likelihood that Head Scenic Painter duties and responsibilities would result in a conflict of interest if included in the bargaining unit – Board concluded the Head Scenic Painter was an employee within the meaning of the Act and was not employed as a “non-working supervisor” or occupying a position above the rank of non-working supervisor – Board directed that the ballots cast in the representation vote be counted – Matter continues.

DRAYTON THEATRES INC. OPERATING AS DRAYTON ENTERTAINMENT; RE: INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA LOCAL 828; OLRB Case No: 2203-20-R; Dated September 27, 2021; Panel: Patrick Kelly (21 pages)

Application for Certification – Unfair Labour Practice – Employer alleged intimidation and coercion by union organizers during certification campaign – Board dismissed allegation that union organizers sought to intimidate or coerce employees into signing membership cards by approaching them without wearing masks and not social distancing during the Covid-19 pandemic – Board rejected employer's “hypothetical example that someone may have signed a card just to get a union organizer away from them”, noting that there was no evidence to support this and that, in any event, the employees were adults with “the

cognitive capability to make the decision whether to sign a membership card or to tell the person to leave and to alert the appropriate authority figure if they do not” – Board noted no employee made submission to the Board about voluntariness of membership evidence – Board found an unfair labour practice occurred, however, when union representative asserted “if we wanted to, we can make it look like you’re trying to help the union” – Given the context, Board found comment amounted to an intimidation and coercion tactic that breached section 76 of the *Labour Relations Act, 1995* – Matters continue.

ROTO-MILL INC.; RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; OLRB Case Nos. 1518-20-R, 1562-20-U and 1612-20-U; Dated September 22, 2021; Panel: M. David Ross (7 pages)

Construction Industry – Grievance Referral – Accommodation

- Union filed two grievances against two employers on behalf of its member – Parties agreed to having the two grievance referrals adjudicated together – Medical note provided to employers was brief but sufficient to conclude that grievor was disabled within the meaning of Ontario’s *Human Rights Code* – No reasonable basis upon which employers could conclude the underlying reason for the request to accommodate was related to a transitory ailment – Union established a *prima facie* case of discrimination by the employers against the grievor on the basis of disability – Employers were then required to establish “a non-discriminatory explanation for its decision to not accept the referral” of the grievor into its employment – One employer did not call a witness to establish a non-discriminatory explanation for its decision – One employer asserted that context of construction industry should be considered – Board agreed employment relationships in construction industry are typically transitory in nature – While employment was expected to be short term, and length of anticipated employment may affect question of when hardship becomes undue, the protection of section 5 of the *Human Rights Code* continued to apply without

limitation – Board noted that “in the face of insufficient information regarding the nature of an individual’s work limitations and need for accommodation, a potential employer ought to make inquiries of the worker and his or her bargaining agent in order to fill that gap” – Board declared that the employers violated the Code and breached their collective agreement obligations by refusing accept the referral of the grievor to employment - In accordance with agreement between parties to bifurcate proceedings, Board remitted the issue of remedies back to the parties for consideration.

FM SYLVAN CANADA LTD.; E.S. FOX LTD.;; RE: MILLWRIGHT REGIONAL COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ON ITS OWN BEHALF AND ON BEHALF OF ITS AFFILIATED LOCAL 1592; OLRB Case Nos: 2991-18-G, 3322-18-G; Dated September 23, 2021; Panel: Lee Shouldice (22 pages)

Unfair Labour Practice – Deferral to Grievance Arbitration

– Union claimed employer breached *Labour Relations Act, 1995* by failing to provide it with certain information and by unilaterally ending an agreement – Union also filed a grievance, which was scheduled for hearing before a private arbitrator – Employer argued Board should defer to arbitration process – Board concluded there was a risk of inconsistent findings and that the key issue before arbitrator may be relevant to the determination of the question before Board – Board noted that case was not one which could reasonably be completed before the scheduled arbitration – Board did not consider appropriate the union’s proposal to commence the Board hearings on the understanding that the parties would revisit the deferral issue at a later date should the hearing not be completed in time - Board adjourned application pending a final decision in the grievance arbitration.

TORONTO TRANSIT COMMISSION; RE: AMALGAMATED TRANSIT UNION, LOCAL 113; OLRB Case No.: 2419-20-U; Dated

September 24, 2021; Panel: Lee Shouldice (12 pages)

Unfair Labour Practice – Duty of Fair Representation – Applicant terminated from employment for allegedly having blatantly disregarded the employer’s corporate directives regarding COVID-19 and attending work, and providing misleading information about his COVID-19 testing date and symptoms – Applicant alleged union violated the duty of fair representation in its handling of the investigation and in ultimately deciding not to pursue a grievance – Board concluding application disclosed no *prima facie* breach of section 74 of the *Labour Relations Act, 1995* – Board noted “union was entitled to draw its own conclusions regarding the facts so long as it did so on a non-arbitrary and non-discriminatory basis and was not motivated by bad faith” – Undisputed facts showed “union very much turned its mind to the merits of the grievance, urged the applicant to obtain exculpatory evidence to support his claim of what he was told by Toronto Public Health, considered the documentation he was able to provide, mounted a serious defense of the applicant, but could not persuade the employer of the merits of its position” – Application dismissed.

DINO S. MUJKANOVIC; RE: AMALGAMATED TRANSIT UNION LOCAL 113; RE: TORONTO TRANSIT COMMISSION; OLRB Case No: 0308-21-U; Dated September 28, 2021; Panel: Patrick Kelly (13 pages)

Unfair Labour Practice – Remedies – Union requested leave to amend its unfair labour practice application to include two additional remedies – Union sought to have Board order that a third party be added to and bound by an ongoing arbitration decision – Board concluded the remedies sought in the requested amendments were not permitted by the *Labour Relation Act, 1995* – As a result, Board concluded there was no reason to allow the Union

to amend its Schedule “A” to include them - Union’s request for leave to amend dismissed – Matter continues.

NOVA SERVICES GROUP INC. – COMPASS GROUP CANADA LTD.; RE: HELLENIC CARE FOR SENIORS (TORONTO) INC.; RE: HELLENIC HOME FOR THE AGED INC.; RE: LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB Case No: 3114-19-U; Dated September 28, 2021; Panel: Kelly Waddingham (15 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
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	June 21, 2022
Ontario Catholic School Trustees' Association Divisional Court No. 650/21	2067-20-M	May 24, 2022
Ontario Catholic School Trustees' Association Divisional Court No. 645/21	2067-20-M	May 24, 2022
PipeFlo Contracting Corp. Divisional Court No. 625/21	0170-21-G	Pending
Mammoet Canada Eastern Ltd. Divisional Court No. 609/21	2375-19-G	April 20, 2022
Candy E-Fong Fong Divisional Court No.	0038-21-ES	Pending
Eugene Laho Divisional Court No. 336/21	1869-20-U	February 9, 2022
Symphony Senior Living Inc. Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
AWC Manufacturing LP Divisional Court No. 304/21	1320-20-ES	October 21, 2021
Bomanite Toronto Ltd. Divisional Court No. 271/21	2057-19-G	February 3, 2022
Cambridge Pallet Ltd. Divisional Court No. 187/21	0946-20-UR	May 16, 2022
Kaydian Carney Divisional Court No. 110/21	1583-18-UR	October 7, 2021
Mir Hashmat Ali Divisional Court No. 275/20	0629-20-U	Pending
Guy Morin Divisional Court No. 20-DC-2622	(Ottawa)	2845-18-UR 0892-19-ES Pending
Paul Gemme Divisional Court No. 332/20	3337-19-U	November 25, 2021
Aluma Systems Inc. Divisional Court No. 456/20	2739-18-JD	September 21, 2021
Capital Sports & Entertainment Inc. Divisional Court No. 20-DC-2593	1226-19-ES	Pending

Joe Mancuso Divisional Court No. 28291/19 (Sudbury)	2499-16-U – 2505-16-U	Pending
Daniels Group Inc. Divisional Court No. 018/20	0279-16-R	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	Pending
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	Application for Leave to Appeal to CA – M52577
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	3150-11-R 3643-11-R 4053-11-R	Application for Leave to Appeal to CA – M52413
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Application for Leave to Appeal to CA – M52413
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