

# *H* Ontario Labour Relations Board **HIGHLIGHTS**

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January 2022

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## **SCOPE NOTES**

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of last 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](http://www.canlii.org).

## **NOTICES TO THE COMMUNITY**

The Ontario Labour Relations Board is pleased to announce that Brian O’Byrne has been appointed by the Province as Chair of the Board following a competition held by the Ministry of Labour, Training and Skills Development, effective February 28, 2022.

Mr. O’Byrne is a graduate of the University of Toronto and Osgoode Hall Law School. He will lead the Ontario Labour Relations Board following a legal career as a senior partner at Fasken, and before that as a partner with Fraser & Beatty, with many years of practice in the areas of labour relations, including collective bargaining, employment and workplace human rights law. Mr. O’Byrne has served as National Practice Group Chair, Toronto Practice Group Chair and Steering Committee Member for Fasken’s Labour, Employment and Human Rights Group. He has been recognized over the years as a leading labour law practitioner. Mr. O’Byrne is a frequent speaker

at conferences and seminars and an author on these topics. He has acted for both public and private sector clients and appeared on their behalf in proceedings before arbitrators and tribunals, including the Ontario Labour Relations Board.

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**Construction Industry - Application for Certification** - Applicant Union sought to include two individuals in the bargaining unit on the basis that the Responding Party was their “true employer” – Individuals in question supplied by labour well-known labour supply company – Union moved pursuant to Rule 41.3 to have their status determined based on the materials filed by the parties – Responding Party asserted that it could not be their employer because, *inter alia*, the Responding Party denied that it assigned or supervised their work, and argued at Case Management Hearing that they may have been receiving direction from someone at labour supplier – Work ticket, timesheet, invoice and training documents supplied by Responding Party – Lack of particulars regarding performance of work and supervision and material facts pleaded by Union not contradicted – Board rejected proposition that workers were unsupervised on the site and somehow just knew what to do next – Suggestion that someone at labour supplier was directing them was not pleaded or substantiated and documentary evidence contradicted this suggestion – Nothing pleaded to distinguish this case from Board’s exhaustive case law dealing with labour supply

companies - Workers therefore employed by the Responding Party and included in the bargaining unit for the purposes of the application – Matter continues

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE VANDEL CONSTRUCTION LIMITED; OLRB Case No: 1387-21-R; Dated December 23, 2021; Panel: Geneviève Debané (11 pages)**

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**Construction Industry - Application for certification** – Dispute over whether work performed at meat production plant by the Employer is work within the construction industry as defined in the *Labour Relations Act, 1995* – Employer fixed “potholes” in the plant floors for eight years, often once or twice a month – Work on floors involves removal of floor surface and some underlying concrete, re-surfacing of the floor using concrete epoxy, the grinding of concrete, the chipping of concrete using a jackhammer, and the mixing and application of epoxy – Union argued that the work performed by the Responding Party constituted “repair” work in response to damage – Employer argued that the work was maintenance – Determinations made by the Board are highly contextualized and driven by the particular facts – Work in issue both addresses the damage and enables the flooring to continue to function optimally – Work was assessed based on a non-exhaustive list of factors set out in the jurisprudence, including the nature and purpose of the work in the context of the facility in which the work takes place, the scale and value of the work, whether the work is part of a regular maintenance program, what occasioned the work including whether there is specific damage to be fixed, and whether the work is decorative or significantly so – The work performed on the small area floor patches on an ongoing basis is closer to maintenance work, and thus is not construction work under the Act – The work performed on the larger floor areas constituted construction work, as it was not conducted on an ongoing basis, was performed in entire rooms, and was decorative in nature –

Individuals performing that work therefore employed in the construction industry – Matter continues

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE 2615194 ONTARIO INC.; RE FOCUS FLOORING AND CONSTRUCTION INC.; OLRB Case No: 2898-20-R; Dated December 3, 2021; Panel: C. Michael Mitchell (18 pages)**

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**Construction Industry - Application for Certification** – Union sought all construction labourers bargaining unit in the non-ICI sectors in Board Area No. 8 pursuant to construction industry provisions of the *Labour Relations Act, 1995* – Responding Party filed a “nil” list of employees, and asserted that the Union’s additions to the list of employees were all persons already covered by a collective agreement between the Union and another employer – Union argued that the subcontract arrangement between the Responding Party and the other employer was not a *bona fide* subcontract arrangement but that the Responding Party was simply using the other employer as a paymaster in an attempt to avoid the certification application – Union submitted that the Responding Party was the “true employer” of the individuals – Workers employed pursuant to a collective agreement with one employer cannot be considered employees of another employer for the purposes of an application for certification – There were no facts to suggest that there was any bad faith or “sham/subterfuge” in the engagement of the supplied labourers – Arrangement was *bona fide* subcontracting arrangement that is not in any way contrary to the Act – Workers were already employees covered by a subsisting collective agreement and all members of the Union in good standing - Once it has been demonstrated that individuals in dispute worked under a collective agreement in a different bargaining unit, the traditional “true employer” analysis is not engaged – Application dismissed

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE**

TIFFANY PARK HOMES LTD.; OLRB Case No: 0818-18-R; Dated December 10, 2021; Panel: John D. Lewis (20 pages)

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**Construction Industry – Non-Construction**

**Employer** - Application by employer seeking a declaration that it is a non-construction employer pursuant to the *Labour Relations Act, 1995* – Employer’s admission that its own employees and private contractors performed construction work is irrelevant for legal purposes – Employer can only be a construction employer if it performs construction work for which it receives compensation from an unrelated party – Union submits that Employer performed construction work for which it expected compensation from a third party in four circumstances – First project involved building pallets for transport of whales purchased by a third party – Pallets are chattels, which are not included in the Act’s definition of “construction” – No construction was performed that was causally connected to the payment for the whales – Second project involved construction of a penguin facility – Work was construction, but was performed by Employer for itself, not a third party – Third project involved the breaking up of lengths of monorail to be taken away by a scrap dealer – No demolition was performed by Employer for third party – Work carried out for Employer’s, not third party’s benefit and there was no compensation to Employer for work carried out – Work not work in the construction industry – Fourth project pertained to repair work in campground - Insufficient connection between admission fee charged to the public for camping and Employer’s construction work to find that compensation is being paid to Employer for that construction – Application dismissed

**CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE MARINELAND OF CANADA INC. O/A MARINELAND; OLRB Case No: 1149-19-R; Dated December 22, 2021; Panel: C. Michael Mitchell (21 pages)**

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**Employment Standards** – Status under the *Employment Standards Act, 2000* - Applicant sought review of a decision by the Employment Standards Officer denying him overtime pay – Main issue turns on whether Applicant was an “information technology professional” as defined in the Act and therefore not covered by overtime pay provisions of the Act – “Information technology professional” exemption requires employer to demonstrate that employee was “primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment” – Applicant’s work involved “information systems based on computer and related technologies”, considering he was involved in replacing the Responding Party’s loan and lease software application systems in favour of a more efficient, unified system – Applicant’s work included “investigation” and “analysis” of the current situation in the U.S. and Canada to begin “designing” the new application in light of the information they collected – Applicant was “primarily engaged” in this work, as he spent at least six hours per working day on the project – Applicant’s work was not so trivial or basic that it did not involve “the objective application of specialized knowledge and professional judgment” – Applicant meets the criteria in the test and is deemed an “IT professional” during the impugned time period – Responding Party is thus exempt from paying overtime – Application dismissed

**DOUGLAS SEGUIN; RE PACCAR FINANCIAL SERVICES LTD. SERVICES FINANCIERS PACCAR LTEE; OLRB Case No: 2383-20-ES; Dated December 16, 2021; Panel: Leonard Marvy (19 pages)**

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**Unfair Labour Practice – Duty of Fair Representation** - Applicant alleges that the union breached its duty of fair representation under the *Labour Relations Act, 1995* in relation to matters

arising out of Applicant's employment with school board – Applicant takes issue with COVID-19 vaccine policy and with Union's response to school board's COVID-19 Vaccination Policy – Applicant was placed on non-disciplinary administrative leave of absence without pay for failure to comply with policy – Applicant alleges that union acted in discriminatory fashion by only “effectively representing” certain members, and not those members that are opposed to the COVID-19 vaccine – Bald allegations do not disclose on their face a breach of the Act – There is nothing inherently unlawful about a union making a decision that favours one group of employees over another – Applicant has not pleaded anything to suggest that Union acted without cogent reason or labour relations purpose – Application dismissed

**TINA DI TOMMASO; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; OLRB Case No: 1551-21-U; Dated December 7, 2021; Panel: Lindsay Lawrence (5 pages)**

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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<sup>th</sup> Floor, 505 University Avenue, Toronto.

### Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
<b>City of Hamilton</b> Divisional Court No. 967/21	1299-19-G 1303-19-G 1304-19-G	Pending
<b>Manalco Contracting Ltd.</b> Divisional Court No. 971/21	0295-14-R	Pending
<b>Susan Johnston</b> Divisional Court No. 934/21	0327-20-U	Pending
<b>Reliable Choice Contract Inc.</b> Divisional Court No. 915/21	0486-21-R	Pending
<b>Royal Group Inc.</b> Divisional Court No. 911/21	2440-20-U	Pending
<b>Joe Placement Agency</b> Divisional Court No. DC-21-00000017-0000 (London)	0857-21-ES	Pending
<b>Holland, L.P.</b> 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
<b>Black and McDonald Ltd.</b> Divisional Court No. 502/21	2425-20-G	April 6, 2022
<b>Ontario Catholic School Trustees' Association</b> Divisional Court No. 650/21	2067-20-M	May 24, 2022
<b>Ontario Catholic School Trustees' Association</b> Divisional Court No. 645/21	2067-20-M	May 24, 2022
<b>PipeFlo Contracting Corp.</b> Divisional Court No. 625/21	0170-21-G	Pending
<b>Mammoet Canada Eastern Ltd.</b> Divisional Court No. 609/21	2375-19-G	April 20, 2022
<b>Candy E-Fong Fong</b> Divisional Court No.	0038-21-ES	Pending
<b>Eugene Laho</b> Divisional Court No. 336/21	1869-20-U	February 9, 2022
<b>Symphony Senior Living Inc.</b> Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
<b>AWC Manufacturing LP</b> Divisional Court No. 304/21	1320-20-ES	Dismissed
<b>Bomanite Toronto Ltd.</b> Divisional Court No. 271/21	2057-19-G	February 3, 2022

<b>Cambridge Pallet Ltd.</b> Divisional Court No. 187/21	0946-20-UR	May 16, 2022
<b>Kaydian Carney</b> Divisional Court No. 110/21	1583-18-UR	Dismissed
<b>Mir Hashmat Ali</b> Divisional Court No. 275/20	0629-20-U	January 24, 2022
<b>Guy Morin</b> Divisional Court No. 20-DC-2622 <b>(Ottawa)</b>	2845-18-UR 0892-19-ES	Pending
<b>Paul Gemme</b> Divisional Court No. 332/20	3337-19-U	Dismissed
<b>Aluma Systems Inc.</b> Divisional Court No. 456/20	2739-18-JD	Dismissed
<b>Capital Sports &amp; Entertainment Inc.</b> Divisional Court No. 20-DC-2593	1226-19-ES	Pending
<b>Joe Mancuso</b> Divisional Court No. 28291/19 <b>(Sudbury)</b>	2499-16-U – 2505-16-U	Pending
<b>Daniels Group Inc.</b> Divisional Court No. 018/20	0279-16-R	April 5, 2022
<b>The Captain's Boil</b> Divisional Court No. 431/19	2837-18-ES	Pending
<b>EFS Toronto Inc.</b> Divisional Court No. 205/19	2409-18-ES	Pending
<b>RRCR Contracting</b> Divisional Court No. 105/19	2530-18-U	Pending
<b>AB8 Group Limited</b> Divisional Court No. 052/19	1620-16-R	Pending
<b>Tomasz Turkiewicz</b> Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	Leave to Appeal to CA granted – M52577
<b>China Visit Tour Inc.</b> Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
<b>Front Construction Industries</b> Divisional Court No. 528/17	1745-16-G	Pending
<b>Enercare Home</b> Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Leave to Appeal to CA granted – M52413
<b>Ganeh Energy Services</b> Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	Leave to Appeal to CA granted – M52413

<b>Myriam Michail</b> Divisional Court No. 624/17 <b>(London)</b>	3434-15-U	Pending
<b>Peter David Sinisa Sesek</b> Divisional Court No. 93/16 <b>(Brampton)</b>	0297-15-ES	Pending
<b>Byeongheon Lee</b> Court of Appeal No. M48402	0095-15-UR	Pending
<b>Byeongheon Lee</b> Court of Appeal No. M48403	0015-15-U	Pending
<b>R. J. Potomski</b> Divisional Court No. 12/16 <b>(London)</b>	1615-15-UR 2437-15-UR 2466-15-UR	Pending
<b>Qingrong Qiu</b> Court of Appeal No. M48451	2714-13-ES	Pending
<b>Valoggia Linguistique</b> Divisional Court No. 15-2096 <b>(Ottawa)</b>	3205-13-ES	Pending