

# *H*ighlights Ontario Labour Relations Board

Editors: Aaron Hart, Solicitor  
Lindsay Lawrence, Solicitor

April 2021

**Notice to the Community** - The Ontario Labour Relations Board has posted a competition: Full-Time Vice-Chair (Public Appointments Secretariat competition number PAS-210052). The competition closes May 9, 2021. More information can be found on the Public Appointments Secretariat website at:

<https://www.pas.gov.on.ca/Home/Advertisement/432>

## SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April 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).

**Application for certification – Bargaining unit** – Union proposed a bargaining unit of Operations Supervisors (“OS”) – Employer argued that the OS were the first level of management and were ineligible to participate in collective bargaining by virtue of subsection 1(3)(b) of the *Labour Relations Act* – Majority of the Board concluded the OS did not perform managerial functions as set out in subsection 1(3)(b) of the Act – Majority of Board held the “supervisory, coordinating, investigating, reporting, consulting and minor admonitory

functions” performed by the OS were not “managerial functions” having regard to the employer’s particular organization and structure – Majority of Board concluded that OS did not wield substantial power over the working life of other employees and are therefore not in a potential conflict of interest by virtue of gaining access to collective bargaining - Certificate issued.

**TORONTO TRANSIT COMMISSION; RE: CANADIAN UNION OF PUBLIC EMPLOYEES;** OLRB Case No. 2377-19-R; Dated March 10, 2021; Panel: Patrick Kelly, William Cook and Carol Phillips (41 pages)

***Employment Standards Act – Applications for Review – Temporary Help Agency – Prohibited Fees*** - Applicants claiming FDM Group Canada Inc (“FDM”) charged them fees in violation of subsection 74.8(1) of the *Employment Standards Act* – FDM is a temporary help agency, employing persons for the purpose of assigning them to perform work on a temporary basis for other clients of FDM - In exchange for training, wages paid during training, and placement with clients, FDM requires employees to remain with the agency for two years, starting from the date of their first placement – FDM seeking to recover \$30,000.00 from each of the applicants, pursuant to placement employment agreements and/or employee training agreements, when they did not complete the two-year period – Board found the fees or charges set out in these agreements constituted a “fee” for purposes of subsection 74.8(1) of the ESA – The

fee/ charges could not reasonably be characterized as a good faith estimate of damages – Board order FDM to remove from its Employment Agreements those provisions establishing and compelling payment of the prohibited fee.

**GROUPE FDM INC. OPERATING AS FDM GROUP CANADA INC.;** RE: DIRECTOR OF EMPLOYMENT STANDARDS; RE: SAEID NAZEMI; RE: EDUARDO GUZMAN-DIAZ; RE: YINGJIAN LIU; RE: BERNARDO SANDI; OLRB Case Nos. 2752-19-ES, 3414-19-ES, 3415-19-ES, 3584-19-ES; Dated March 12, 2021; Panel: Kelly Waddingham (29 pages)

**Related Employer Application – Subsection 1(5) – Obligation to Adduce Facts at Hearing** – In a related employer application, companies called two witnesses and closed their case in chief – Union brought motion arguing the companies had failed to meet their statutory obligations under subsection 1(5) to “... adduce at the hearing all facts within their knowledge that are material to the allegation” – Union requesting that Board direct the companies to call further evidence – Board noted there had not been a great deal of jurisprudence about the exact parameters of the subsection 1(5) obligation and that any determination on whether the obligation has been satisfied is specific to the particular facts of each case – Board found the union could point to no specific deficiency in the evidence adduced – Board concluded that it would not direct further evidence – Board noted that any failure to call evidence was ultimately a risk run by the companies, and the Union could make argument on this point and request the drawing of adverse inferences at the end of the day - Motion dismissed.

**FOSTER WHEELER LIMITED ET AL.;** RE: CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ON ITS OWN BEHALF AND ON BEHALF OF ITS AFFILIATED LOCAL UNIONS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 397 AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486; OLRB Case No. 1876-18-R; Dated March 29, 2021; Panel: Bernard Fishbein (13 pages)

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**Unfair Labour Practice – Unlawful Strike – Threatening Unlawful Strike** – Allegations concerning bricklayers not attending at work on builders’ sites – Board concluded that the applicants had not established that the individual bricklayers (the employees) engaged in refusing to work or refusing to continue to work in combination or concert to reduce output, within the definition of a strike – Board concluded therefore that no violation of section 79 of the *Labour Relations Act* had occurred – Board concluded, however, that the union and its representatives threatened an unlawful strike or committed acts the reasonable and probable consequence of which is others will engage in an unlawful strike contrary to sections 81 and 83 of the *Labour Relations Act, 1995* – Union also violated section 87(2) of the Act in that it sought to impose a penalty for participating in a proceeding under the Act, and, in particular, this unlawful strike application – Application granted in part.

**RAS-CON GROUP INC.;** RE: LABOURER'S INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE: MASONRY CONTRACTORS ASSOCIATION OF TORONTO; RE: MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY; RE: BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; RE: TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU; OLRB Case Nos. 2275-20-U, 2297-20-U; Dated March 4, 2021; Panel: Bernard Fishbein (56 pages)

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## COURT PROCEEDINGS

**Judicial Review – Related Employer** – Application for judicial review of a Board decision in a related employer application – Board concluded three companies were “related” employers within the meaning of subsection 1(4) of the *Labour Relations Act* – Companies applying for judicial review of the Board’s decision – Court concluded the Board’s decision was unreasonable – According to the Court, the Board failed to take

relevant factors into account including bargaining history, the collective agreement and various letters of understanding involving longstanding contracting out practices – Judicial Review allowed - Court set the Board’s decision aside and remitted the matter back for a fresh hearing before a different Vice-Chair.

**ENERCARE HOME & COMMERCIAL SERVICES LIMITED PARTNERSHIP; RE: GANEH ENERGY SERVICES LTD.; RE: BEAVER ENERGY SERVICES LTD.; RE: UNIFOR, LOCAL 975; RE: PERRAS MECHANICAL SERVICES LTD; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 515/17 and 521/17; Dated March 26, 2021; Panel: Corbett, Ducharme and Petersen JJ. (28 pages)**

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**Judicial Review – Successor Employer –**  
Application for judicial review of Board decision finding that a receiver was a “successor employer” within the meaning of the *Labour Relations Act* – Court held the decision was reasonable, being in accordance with the language of the Act and consistent with a long line of Board decisions – Court noted that the Board had examined the relevant provisions of the *Bankruptcy and Insolvency Act*, and had correctly found that the BIA did not preclude a declaration that a receiver was a “successor employer” – Application dismissed.

**RE: DELOITTE RESTRUCTURING INC.; RE: UNITED FOOD AND COMMERCIAL WORKERS INT’L UNION LOC. 175; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 238/18; Dated March 31, 2021; Panel: Corbett, Ducharme and Gomery JJ. (13 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>Cambridge Pallet Ltd.</b> Divisional Court No. 187/21	0946-20-UR	Pending
<b>Kaydian Carney</b> Divisional Court No. 110/21	1583-18-UR	October 7, 2021
<b>Mir Hashmat Ali</b> Divisional Court No. 275/20	0629-20-U	Pending
<b>Guy Morin</b> Divisional Court No. 20-DC-2622	2845-18-UR 0892-19-ES	Pending
<b>(Ottawa)</b>		
<b>SNC Lavalin Nuclear Inc.</b> Divisional Court No. 473/20	3488-19-ES	April 20, 2021
<b>KD Poultry</b> Divisional Court No. 20-DC-2611	0618-19-ES 1683-19-ES 1684-19-ES 2165-19-ES	June 2, 2021
<b>(Ottawa)</b>		
<b>Paul Gemme</b> Divisional Court No. 332/20	3337-19-U	November 25, 2021
<b>Fortis Construction Group Inc.</b> Divisional Court No. 395/20	1638-17-R	May 11, 2021
<b>Aluma Systems Inc.</b> Divisional Court No. 456/20	2739-18-JD	September 21, 2021
<b>Anthony Hicks</b> Federal		
<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	2499-16-U – 2505-16-U	Pending
<b>(Sudbury)</b>		
<b>Abdul Aziz Samad</b> Divisional Court No. 019/20	3009-18-ES	Pending
<b>Daniels Group Inc.</b> Divisional Court No. 018/20	0279-16-R	Pending
<b>Community Care Access Centers</b> Divisional Court No. 720/19	0085-16-PE 0094-16-PE	May 12-13, 2021
<b>Audrey Thomas</b> Divisional Court No. 436/19	2508-18-U	April 19, 2021
<b>The Captain's Boil</b> Divisional Court No. 431/19	2837-18-ES	Pending

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<b>Kuehne + Nagel Ltd.</b> Divisional Court No. 393/19	0433-18-R	Pending
<b>Todd Elliott Speck</b> Divisional Court No. 371/19	1476-18-U	November 18, 2020
<b>New Horizon</b> Court of Appeal No. C68664	0193-18-U	June 1, 2021
<b>Doug Hawkes</b> Divisional Court No. 249/19	3058-16-ES	May 17, 2021
<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	Adjourned due to pandemic
<b>AB8 Group Limited</b> Divisional Court No. 052/19	1620-16-R	Adjourned due to pandemic
<b>Tomasz Turkiewicz</b> Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
<b>Deloitte Restructuring Inc.</b> Divisional Court No. 238/18	2986-16-R	Dismissed
<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	Adjourned due to pandemic
<b>Enercare Home</b> Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Allowed
<b>Ganeh Energy Services</b> Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
<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