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Ontario Labour Relations Board HIGHLIGHTS

Editors: Aaron Hart, Solicitor
Lindsay Lawrence, Solicitor

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February of this year. These decisions will appear in the January/February 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 – Dependant Contractor – Union filed application for certification seeking to represent group of couriers – Employer argued couriers were independent contractors – Board held couriers were dependant contractors within the meaning of the Act and therefore entitled to collective bargaining – Board applied factors set out in *Algonquin Tavern* – Board found couriers are limited to their own skill and labour and are not permitted to subcontract delivery services to substitutes or directly swap shifts – Although couriers provide some tools, the Board found the Employer owns and controls the software application (the "App"), the single most important part of the delivery process – Board found couriers cannot improve their chance to make a profit through customary entrepreneurial tools and the risk of loss to couriers is minimal – Board held the ability to make more money by working harder, whether by making more deliveries or performing services for more than one company, must not be mistaken for entrepreneurial activity – Board held couriers do not sell their services to the market generally – Board found couriers are expected to comply with Employer's service standards when accepting a shift and failure to do so may result in a strike against them or termination of services – With respect to mobility and independence, the Board acknowledged couriers have some flexibility in the performance of their work and often work for other food courier companies – However, the Board found the Employer has a complex system of incentives and restrictions that control the couriers' behaviour – Board found all couriers share the same terms and conditions as determined by the Employer and have no independent opportunity to vary their rate – Board found couriers are heavily integrated into Employer's business, which depends entirely on couriers' delivery service – Board found couriers have no opportunity, nor reason, to develop independent relationships with customers or restaurants – Board found Employer controls generation and flow for work, including developing relationships, exclusive utilization of the App, and scheduling and control of the couriers' work – Board held couriers more closely resemble employees than independent contractors – Accordingly, Board held couriers are independent contractors and must be treated as such under the Act.

FOODORA INC. DBA FOODORA; RE: CANADIAN UNION OF POSTAL WORKERS; OLRB File No.: 1346-19-R; Dated February 25, 2020; Panel: Matthew R. Wilson (40 pages)

Certification – Representation Vote – Practice and Procedure – Employer requested electronic vote because at least two employees in the proposed bargaining unit would be on vacation when vote occurred – Employer argued it is important every employee be given the opportunity to vote given the small size of the proposed bargaining unit, which it claimed had 19 employees – Board held it was not appropriate to order electronic vote – Board held determination of whether to grant an electronic vote is made on a case-by-case basis – Board has considered factors such as size of bargaining unit, location(s) at which employees work, cost of electronic vote, and Board's limited staff resources – Board noted these factors are not exhaustive and

will change over time – Board noted it was not unusual that some employees may be absent from workplace at the time of the vote – Board held the fact an employee is away from work on the day of the vote does not mean that individual cannot attend the workplace to cast a paper ballot – Board held electronic vote does to mean all employees will necessarily participate in the vote – Bargaining unit is relatively small and employees work out of single site – Board held the fact employees were in Toronto as opposed to a remote location meant the Board could easily dispatch employees – Board held it was not necessary to depart from traditional paper ballot and incur costs associated with electronic vote.

HUMBER RIVER HOSPITAL; RE: NATIONAL ORGANIZED WORKERS; OLRB File No.: 3155-19-R; Dated February 14, 2020; Panel: Peigi Ross (3 pages)

Certification – Representation Vote – Practice and Procedure – Unfair Labour Practice – Applicant filed displacement application for certification – Applicant filed unfair labour practice application under s. 96 and sought remedial certification under s. 11 – Employer gave notice under section 8.1 – Representation vote was taken and ballot box was sealed – Applicant and Employer agreed the ballot box should be opened and ballots counted in accordance with s. 8.1(4) – Intervenor requested ballot box remain sealed – Intervenor argued that as the incumbent bargaining agent and a party to this proceeding its interests ought to be considered relevant – Intervenor argued unsealing the ballot box and counting the ballots at this stage has the potential to cause it significant labour relations harm and prejudice – Applicant argued Intervenor has no right to give notice or to be consulted for the purpose of sealing or unsealing the ballot box – Board agreed only the Employer can provide notice under s. 8.1 – However, Intervenor has delivered and filed a response to the certification application, is a party to the proceeding and has a direct interest in whether the ballots cast should be counted – Board held it will not count ballots over the objection of a party without carefully weighing the consequences of doing so – Board held Intervenor's reasons for objecting were sound – Board held there is potential for significant labour relations harm if the ballot box is unsealed in that Intervenor's ability to represent employees in the bargaining unit may be compromised – Board acknowledged counting the ballots may determine or help to determine some of the issues in dispute – However, the Board held it ought not to order ballots counted if the principle reason for doing so is the possibility that expenditure of resources on continuing litigation might be avoided – Board was not prepared to order ballot box be opened and the ballots counted at this time.

FRISONI MECHANICAL INC.; RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; RE: CONSTRUCTION WORKERS UNION, CLAC LOCAL 52; OLRB File No.: 2736-19-U & 2762-19-U; Dated February 21, 2020; Panel: Lee Shouldice (5 pages)

Grievance – Damages – Jurisdictional Dispute – Carpenters referred grievances to arbitration under s. 133 – Work performed under a Project Agreement ("PA") pursuant to s. 163.1 was assigned to the Labourers – Board held the work should have been assigned to the Carpenters in its jurisdictional dispute decision – Primary basis for decision was the Board's determination that use of the Formwork Agreement was not permitted under the PA – Carpenters sought damages – Board's general approach is not to award damages unless the Employer's work assignment was unreasonable – Board held when a contractor fails to act in good faith, or deliberately acts contrary to a prior Board decision, prior agreement or clearly established practice, damages may follow – Board found this was a case of first instance and Employer had no precedential decision to guide it – Board held the Employer's work assignment, while wrong, had a rational basis and was not unreasonable, arbitrary or implausible – Board found that in assigning the work, the Employer considered its past practice, the practice of other contactors in performing the work, and economy and efficiency – Board concluded this was not one of those "rare" cases falling within the "narrow exception" to the general rule that damages do not flow from a jurisdiction dispute determination – Board stated this decision may serve as a springboard to a claim for damages should any contractor attempt to use the Formwork Agreement on a section 163.1 project in the future.

HAYMAN CONSTRUCTION INC.; RE: UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946; RE: TOYOTA MOTOR MANUFACTURING CANADA, INC.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; RE: CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; OLRB File No.:

0903-17-G, 0904-17-G & 2807-18-G; Dated February 11, 2020; Panel: Jack J. Slaughter (16 pages)

Unfair Labour Practice – Duty to Bargain in Good Faith – Interference in Trade Unions – Union filed an application under s. 96 alleging violations of ss. 17, 70, 72 and 73 – Union requested the pension contract and training and advancement materials during negotiation of the renewal collective agreement – Employer refused to provide disclosure – Board held the case law does not support disclosure to a party resulting from the tabling of its own proposal – Board held the test for a s. 70 violation is whether the disclosure of the information sought by the trade union is so necessary to the bargaining agent in its representation of employees that a failure to disclose it amounts to improper inference – Employer provided the Union the opportunity request specific information about pension but Union declined – Parties disagreed about whether the pension plan was directly incorporated into the collective agreement – Board held this was an issue for an arbitrator to decide – Board held the Union sought the pension information for the purpose of fashioning proposals and therefore the Employer's refusal did not meet the threshold for a s. 70 violation – Employer did not dispute training was incorporated into the collective agreement – Board held the Employer's refusal to respond to the Union's request for training and advancement materials violated s. 70 given the prominence of training in the expired collective agreement and the fact some information requested pertained to individual bargaining unit members – Board held the recognition in the expired collective agreement of the Union's right to have input into training program was a relevant factor in the assessment of whether s. 70 applied – Board ordered the Employer to provide copies of training and advancement materials – Board declined to find violations of ss. 17, 72 or 73.

BOMBARDIER TRANSPORTATION – NORTH AMERICA; RE: TEAMSTERS CANADA RAIL CONFERENCE, DIVISION 660; OLRB File No.: 3535-18-U; Dated February 13, 2020; Panel: Patrick Kelly (31 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
Rochelle Sherwood Divisional Court No. 074/20	1551-19-U 1557-19-UR	Pending
Joe Mancuso Divisional Court No. 28291/19 **(Sudbury)**	2499-16-U – 2505-16-U	Pending
Abdul Aziz Samad Divisional Court No. 019/20	3009-18-ES	Pending
Daniels Group Inc. Divisional Court No. 018/20	0279-16-R	Pending
Audrey Thomas Divisional Court No. 436/19	2508-18-U	Pending
The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
Kuehne + Nagel Ltd. Divisional Court No. 393/19	0433-18-R	Pending
Todd Elliott Speck Divisional Court No. 371/19	1476-18-U	Adjourned due to pandemic
New Horizon Divisional Court No. 264/19	0193-18-U	May 7, 2020
Doug Hawkes Divisional Court No. 249/19	3058-16-ES	Pending
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	May 19, 2020
AB8 Group Limited Divisional Court No. 052/19	1620-16-R	Adjourned due to pandemic
Tomasz Turkiewicz Divisional Court No. 262/18, 601/18 & 789/18	2375-17-G 2375-17-G 2374-17-R	November 19, 2019
Deloitte Restructuring Inc. Divisional Court No. 238/18	2986-16-R	November 18, 2019
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Ramkey Construction Inc. Court of Appeal No. M49563	1269-15-R	SCC 38979

(March 2020)

Front Construction Industries Divisional Court No. 528/17	1745-16-G	Adjourned due to pandemic
Enercare Home Divisional Court No. 521/17	3150-11-R 3643-11-R 4053-11-R	Pending
Ganeh Energy Services Divisional Court No. 515/17	3150-11-R 3643-11-R 4053-11-R	October 21, 2019
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
Kognitive Marketing Inc. Divisional Court No. 51/15 **(London)**	0621–14–ES	Pending
Valoggia Linguistique Divisional Court No. 15–2096 **(Ottawa)**	3205–13–ES	Pending