

# *H*IGHLIGHTS Ontario Labour Relations Board

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October 2022

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## **Notice to Community – Vice-Chair Postings (Full-Time and Part-Time) – October 25, 2022**

The Ontario Labour Relations Board has posted to fill vacancies for full-time and part-time Vice-Chair positions. Applications to apply for these positions are due on or before **November 7, 2022**. For more information about the positions and how to apply, please visit

<https://www.pas.gov.on.ca/Home/Agency/357>.

## **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](http://www.canlii.org).

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**Construction Industry – Application for Certification** – Dispute over status of four workers and whether they should be included in the bargaining unit – Work done by disputed workers involved taking core samples from newly paved asphalt roads, and patching the holes created – Nature of core sampling work is quality control – Quality control work not construction work – Work properly characterized as function of the laboratory and not construction work – Employees excluded from applied for bargaining unit.

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**LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059, RE: LAVIS CONTRACTING CO. LIMITED**; OLRB Case No: 1599-17-R; 1665-17-U; 1816-17-U; Dated September 27, 2022; Panel: Yvon Seveny (16 pages)

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**Construction Industry Grievance** - Union alleged that the Employer under-remitted pension and benefit contributions during term of previous collective agreement – Dispute arose out of disagreement as to the proper contributions to be made pursuant to the collective agreement - Employer argued that grievance was filed out of time - Collective agreement required grievances on pension and benefit issues to be submitted within three months of incident giving rise to the grievance – Time limit determined to be mandatory – Grievance not filed until three years after initial circumstances giving rise to the grievance – Complaint is of a continuing nature, but even if last occurrence was in April 2019 (when the collective agreement expired), grievance still filed over three months after that date – Board can exercise discretion to extend time to file grievance – Where considering giving extension, Board considers reason for delay, length of delay, nature of grievance, whether grievor responsible for delay, whether delay was in filing the grievance or later in the process, and whether Employer could have reasonably assumed grievance was abandoned – Board concluded that these factors all weighed against extending the time for filing the grievance – Grievance dismissed.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, RE: **EARTH BORING COMPANY LIMITED**, RE: GREATER TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION; OLRB Case No: 2259-19-G; 2698-19-G; Dated September 20, 2022; Panel: Michael McFadden (14 pages)

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**Duty of fair representation** – Applicant a sanitation lead hand with 16 years seniority – Duty of fair representation complaint arising from his termination - Employer had implemented policy mandating COVID-19 vaccination or to undergo regular testing, failing which disciplinary measures would be taken – Applicant objected to testing element of policy and did not comply – Stated reason for refusal was that the Employer did not pay for test, and employee had to pay out of pocket – Union had filed grievance on his behalf, which Employer denied without reasons – Employer put employee on notice that continued refusal to abide by policy would result in termination for cause – Union informed employee that it would not grieve termination, as it saw no prospect of success – Review of applicable Board principles involving the duty of fair representation – Union must not act in a way that is arbitrary, discriminatory, or in bad faith – Union must give fair and objective consideration – Discharge grievance attracted a higher standard – Just cause protection in the collective agreement meant that individual circumstances of the affected employee must be considered and whether the penalty was just, including progressive discipline - Union failed to turn its mind to employee’s individual circumstances – Union also failed to turn its mind to applicant’s potential entitlement to severance - Union failed to meet the higher standard given context of situation – Application granted.

**NIJAH SCOTLAND**, RE: UNIFOR LOCAL 6006, RE: COMMERCIAL BAKERIES COR., INTERVENORS; OLRB Case No: 2276-21-U; Dated September 20, 2022; Panel: Lindsay Lawrence (13 pages)

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**Employment Standards – Termination Pay** – Employment Standards Officer had determined employee was not entitled to termination pay pursuant to the *Employment Standards Act* (the “Act”) as employment ended due to death of employee – Employee contracted influenza B, which unexpectedly proved fatal - Dispute over degree of knowledge of Employer as to employee’s medical condition – Employer had taken no steps to terminate employee’s employment – Illness or injury making employment impossible or frustrated still requiring termination pay – Parties disagreed over whether applicable provision requires employer intention or action – Result depends upon interpretation of sections 57 and 61 of the Act and sections 2(1)4 and 2(3) of O. Reg. 288/01 pursuant to the Act – Principles of statutory interpretation reviewed – Act remedial in purpose and conferring benefits and therefore favours a broad and generous interpretation – However, Act must be read in a way that promotes internal harmony, coherency, and consistency, and is informed by surrounding context – Proper interpretation of relevant statutory provisions requires some action by Employer, and there was none in this case – Application dismissed.

ANTONIA BECERRIL JIMENEZ, RE: **PICCIONI BROS. MUSHROOM FARM LIMITED**, AND DIRECTOR OF EMPLOYMENT STANDARDS; OLRB Case No: 2656-20-ES; Dated: September 16, 2022; Panel: Peigi Ross (25 pages)

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**Ministerial Reference** – *Hospital Labour Disputes Arbitration Act* (“HLDAA”) – Applicant Employer alleged changes in hospital organizational structure resulted in the facility no longer being subject to HLDAA – Question whether bargaining unit employees are “hospital employees,” and whether employer’s operation is a hospital – Review of factors and case law principles that elucidate whether location is a hospital or other institution – Observation, care or treatment as core function is the most critical factor in determining whether a facility is a hospital – Importance of institutional control to defining what is a hospital – Where an institution has more than one function, Board looks

at whether it meets the definition as a whole – Over-inclusion of employees not conducting observation, care or treatment has been previously recognized by the Board and may occur – Though each program administered by employer ought to be considered, they need not all meet the definition of a hospital – Various mental health programs, housing programs, and some seniors programs found not to provide observation, care, or treatment in a medical sense – Withdrawal management programs, stabilization programs, and other seniors programs found to provide observation, care, or treatment in medical sense – Institutional approach of HLDAA ensures no strike or lock out could compromise the health and well-being of clients, without having to speculate on contingency programs – Despite new programs, mere quantitative assessment of what employees work in which programs incompatible with HLDAA’s protective purpose – Qualitative assessment leads to the conclusion that programs falling in hospital program still would require protection from consequences of strike and lockout – Statutory interpretation requires a holistic analysis rather than a focus on any single factor, such as the over-inclusion principle or quantitative aspects - Institution still properly designated as a hospital for the purposes of the HLDAA – Such a characterization not immutable and may change over time as programs change.

**MONFORT RENAISSANCE INC., RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4721-04; OLRB Case No: 0706-19-MR; Dated September 12, 2022; Panel Michael McCrory (53 pages)**

there was no nexus between the termination of an employee and his purported exercise of a right to personal emergency leave under the ESA, or his filing of a harassment complaint engaging rights under the OHSA – Divisional Court found that the Board had reasonably applied the test for reprisal under both Acts, requiring that there be a nexus or connection between the protected conduct and the alleged reprisal – Board had also reasonably exercised its discretion to exclude evidence as hearsay and also as contrary to the rule in *Browne v. Dunn*, and fully explained its reasons for doing so – Board reasonably concluded that there was no reprisal contrary to either Act – Application dismissed

**GUY MORIN; RE: MINISTER OF LABOUR (ONTARIO), DIRECTOR OF EMPLOYMENT STANDARDS, RE: ATTORNEY GENERAL (ONTARIO), RE: HUAWEI TECHNOLOGIES CANADA CO., LTD.; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. DC-2622-20; Dated September 27, 2022; Panel: Aston, Swinton, and Sheard JJ. (25 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, 7<sup>th</sup> Floor, 505 University Avenue, Toronto.

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## COURT PROCEEDINGS

**Employment Standards – Health and Safety – Judicial Review** - Application for judicial review of a Board decision dismissing unlawful reprisal applications under the Employment Standards Act, 2000 (“ESA”) and the Occupational Health and Safety Act (“OHSA”) – Board determined that

### Pending Court Proceedings

| Case name & Court File No.   | Board File No.                                     | Status               |
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| <b>Mina Malekzadeh</b><br>Divisional Court No. 553/22                                      | 0902-21-U<br>0903-21-UR<br>0904-21-U<br>0905-21-UR | Pending              |
| <b>Temporary Personnel Solutions</b><br>Divisional Court No. 529/22                        | 3611-19-ES   | Pending              |
| <b>Mulmer Services Ltd.</b><br>Divisional Court No. 504/22                                 | 2852-20-MR   | Pending              |
| <b>Simmering Kettle Inc.</b><br>Divisional Court No. DC-22-00001329-00-JR -<br>(Oshawa)    | 0012-22-ES   | Pending              |
| <b>1476247 Ontario Ltd. o/a De Grandis Concrete Pumping</b><br>Divisional Court No. 401/22 | 0066-22-U  | April 25, 2023       |
| <b>Elementary Teachers' Federation of Ontario</b><br>Divisional Court No. 367/22           | 0145-18-U  | Pending              |
| <b>Michael Peterson, et al.</b><br>Divisional Court No. 003/22                             | 2301-21-R &<br>0046-22-R                           | December 5, 2022     |
| <b>Strasser &amp; Lang</b><br>Divisional Court No. 003/22                                  | 2301-21-R &<br>0046-22-R                           | December 5, 2022     |
| <b>CTS (ASDE) INC.</b><br>Divisional Court No. 295/22                                      | 0249-19-G<br>2580-19-G<br>2581-19-G                | Pending              |
| <b>Aecon Group Inc.</b><br>Divisional Court No. 301/22                                     | 1016-21-HS   | January 24, 2023     |
| <b>Sleep Country Canada</b><br>Divisional Court No. 402/22                                 | 1764-20-ES<br>2676-20-ES                           | June 6, 2023         |
| <b>Capital Sewer Services Inc.</b><br>Divisional Court No. 280/22                          | 1826-18-R  | Pending              |
| <b>The Ontario Secondary School Teachers' Federation</b><br>Divisional Court No. 187/22    | 0145-18-U<br>0149-18-U                             | April 3, 2023        |
| <b>City of Hamilton</b><br>Divisional Court No. 967/21                                     | 1299-19-G<br>1303-19-G<br>1304-19-G                | December 12-13, 2022 |
| <b>Susan Johnston</b><br>Divisional Court No. 934/21                                       | 0327-20-U  | November 2, 2022     |
| <b>Joe Placement Agency</b><br>Divisional Court No. DC-21-00000017-0000<br>(London)        | 0857-21-ES   | Pending              |

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| <b>Holland, L.P.</b><br>Divisional Court No. 673/21  | 2059-18-R<br>2469-18-R<br>2506-18-R<br>2577-18-R<br>0571-19-R<br>0615-19-R | February 2, 2023 |
| <b>Candy E-Fong Fong</b><br>Divisional Court No.   | 0038-21-ES   | Pending          |
| <b>Symphony Senior Living Inc.</b><br>Divisional Court No. 394/21                                      | 1151-20-UR<br>1655-20-UR   | Pending          |
| <b>Guy Morin</b><br>Divisional Court No. 20-DC-2622<br>(Ottawa)  | 2845-18-UR<br>0892-19-ES   | Dismissed        |
| <b>Capital Sports &amp; Entertainment Inc.</b><br>Divisional Court No. 20-DC-2593                      | 1226-19-ES   | Pending          |
| <b>Joe Mancuso</b><br>Divisional Court No. 28291/19<br>(Sudbury)                                       | 2499-16-U –<br>2505-16-U   | Pending          |
| <b>The Captain's Boil</b><br>Divisional Court No. 431/19   | 2837-18-ES   | Pending          |
| <b>EFS Toronto Inc.</b><br>Divisional Court No. 205/19   | 2409-18-ES   | Pending          |
| <b>RRCR Contracting</b><br>Divisional Court No. 105/19   | 2530-18-U  | Pending          |
| <b>AB8 Group Limited</b><br>Divisional Court No. 052/19  | 1620-16-R  | Pending          |
| <b>Tomasz Turkiewicz</b><br>Divisional Court No. 262/18, 601/18 & 789/18<br>Court of Appeal No. C69929 | 2375-17-G<br>2375-17-G<br>2374-17-R  | May 25, 2022     |
| <b>China Visit Tour Inc.</b><br>Divisional Court No. 716/17  | 1128-16-ES<br>1376-16-ES   | Pending          |
| <b>Front Construction Industries</b><br>Divisional Court No. 528/17                                    | 1745-16-G  | Pending          |
| <b>Enercare Home</b><br>Divisional Court No. 521/17<br>Court of Appeal No. C69933                      | 3150-11-R<br>3643-11-R<br>4053-11-R  | May 25, 2022     |
| <b>Ganeh Energy Services</b><br>Divisional Court No. 515/17<br>Court of Appeal No. C69933              | 3150-11-R<br>3643-11-R<br>4053-11-R  | May 25, 2022     |
| <b>Myriam Michail</b><br>Divisional Court No. 624/17<br>(London)                                       | 3434-15-U  | Pending          |
| <b>Peter David Sinisa Sesek</b><br>Divisional Court No. 93/16<br>(Brampton)                            | 0297-15-ES   | Pending          |

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| <b>Byeongheon Lee</b><br>Court of Appeal No. M48402                             | 0095-15-UR                             | Pending |
| <b>Byeongheon Lee</b><br>Court of Appeal No. M48403                             | 0015-15-U                              | Pending |
| <b>R. J. Potomski</b><br>Divisional Court No. 12/16<br><b>(London)</b>          | 1615-15-UR<br>2437-15-UR<br>2466-15-UR | Pending |
| <b>Qingrong Qiu</b><br>Court of Appeal No. M48451                               | 2714-13-ES                             | Pending |
| <b>Valoggia Linguistique</b><br>Divisional Court No. 15-2096<br><b>(Ottawa)</b> | 3205-13-ES                             | Pending |