

# *H*IGHLIGHTS Ontario Labour Relations Board

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## 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).

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**Certification – Managerial Exclusion** – Union filed application for certification in respect of a bargaining unit consisting of registered practical nurses (“RPNs”) - Employer asserted that the bargaining unit contained no employees within the meaning of the *Labour Relations Act, 1995* because the RPNs were managerial - Union asserted that Employer had not pleaded a *prima facie* case that the RPNs were managerial - Board concluded that the facts pleaded indicated that the RPNs performed some supervisory or advisory roles, such as overseeing professional performance or providing guidance and advice, but did not have responsibilities that would have a critical impact on employees’ work lives that would warrant exclusion from the bargaining unit - RPNs were also not employed in a confidential capacity since any confidential information in RPNs’ possession was not related to the responding party’s labour relations or collective bargaining strategy or approach - Matter continues

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA RE: **PARTICIPATION HOUSE MARKHAM**; OLRB Case No. 0817-23-R; Dated March 27, 2024; Panel: Timothy P. Liznick (19 pages)

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**Construction Industry – Certification – Abandonment** – LIUNA sought non-ICI certificate in respect of construction labourers and operating engineers employed by the Employer – LIUNA asserted that IUOE had abandoned any non-ICI bargaining rights it previously possessed - Employer and IUOE submitted that bargaining history indicated that no abandonment had occurred – LIUNA argued that a long period of unbroken inactivity between 2012 and 2021 disclosed abandonment – Board concluded that from approximately 2012 to 2021, IUOE did not actively promote its bargaining rights but had made only limited efforts to achieve a collective agreement - Events in 2021 purporting to resume bargaining did not "cure" the abandonment - Board concluded that once bargaining rights are abandoned, they must be re-acquired, and that mere renewal of bargaining efforts does not constitute such re-acquisition - Matter continues

LABOURERS’ INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL RE: **CLEAN WATER WORKS INC.**; OLRB Case No. 1093-21-R;

Dated March 5, 2024; Panel: Michael McFadden (22 pages)

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**Construction Industry – Certification** – IUOE sought to carve out its craft unit from CLAC all-construction employee bargaining unit - Dispute over whether or not surveyors should be included in the bargaining unit - Application initially included surveyors but in status submissions amendment was sought on the basis that surveyors were not covered by the CLAC collective agreement and therefore should be excluded - Dispute over whether application could be amended at that point in the proceeding and whether it was appropriate to exclude them - Without determining whether or not it was advisable to allow the amendment, the Board determined that surveyors should not be excluded from the bargaining unit - The "mirroring principle" typically requires the displacing union to assume the existing bargaining unit - The craft carve-out in the construction industry is an exception - Board's jurisprudence is to the effect that if an applicant chooses to carve out its craft in the ICI sector, the appropriate bargaining unit is the designated bargaining unit, which in this case includes surveyors - Matter continues

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, RE: NUNA LOGISTICS PARTNERSHIP, NUNA LOGISTICS LIMITED; OLRB Case No. 1093-22-R; Dated March 12, 2024; Panel: Michael McFadden (13 pages)

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**Unfair Labour Practice - Duty Of Fair Representation** – Applicant cocktail bartenders asserted that union violated section 74 of the *Labour Relations Act, 1995* (the "Act") by allegedly agreeing with the employer to treat beer/alcohol servers more favourably than the cocktail bartenders - Employer had created new position of cocktail bartender and hired employees to fill positions, resulting in a reduction of shifts

available for beer/alcohol servers already employed in bargaining unit - Union filed grievances taking the position that the creation of the position and hiring from outside the bargaining unit, without allowing the beer/alcohol servers to apply for the position, violated the collective agreement - Union and employer settled the grievances on the basis that beer/alcohol servers would be entitled to apply for cocktail bartender positions - Result of this process was that newly-hired cocktail bartenders' shifts were reduced since beer/alcohol servers had greater seniority - Board concluded that Union had not violated s. 74 of the *Act* - Union had considered competing interests of the two groups of employees as well as its own interpretation of the job posting and seniority provisions of the collective agreement - Union met with the affected employees to explain its position and the ultimate resolution favouring the seniority rights of the existing servers was reasonable - Application dismissed.

ANDREW LAWTON, QUINN SMILEY, DYLAN DLIMA, BELINDA SWABY, KIERA SMITH, SAMANTHA PATRUNA AND AL., RE: UNITE HERE LOCAL 75, RE: ARAMARK ENTERTAINMENT SERVICES (CANADA); OLRB Case No. 0755-23-U; Dated March 15, 2024; Panel: Brian D. Mulroney (18 pages)

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**Ministerial Reference – Hospital Labour Disputes Arbitration Act ("HLDAA")** – Dispute over whether or not the employer, a private provider of home care services, was a "hospital" within the meaning of *HLDAA* – Union argued that the ever-increasing trend towards observation, care and treatment being moved away from the traditional hospital setting towards such homes supported the declaration – "Hospital" within the meaning of *HLDAA* must meet three conditions: (a) it must serve persons who suffer from physical or mental illness, disease or injury, or who are convalescent or chronically ill; (b) it must be a hospital, sanitarium, sanatorium, long-term care home or an other institution; and (c) it must be operated for the observation, care or treatment of

such persons – Board concluded that although the Employer provides care to individuals who are ill, convalescent, or chronically ill, it could not be considered an "other institution" under *HLDA* – Board had regard to its prior case law concluding that a home care provider was not an “other institution” within the meaning of *HLDA* – Board considered factors such as the majority of care being provided in private homes, the nature and extent of the care provided, and industry practices and concluded Employer was not a “hospital” within the meaning of *HLDA*.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA, RE: **PARAMED HOME HEALTH**; OLRB Case No. 0908-20-MR; Dated March 4, 2024; Panel: Michael McCrory (31 pages)

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#### **Occupational Health and Safety – Reprisal –**

Applicant asserted that he was reprimed against contrary to section 50 of the *Occupational Health and Safety Act*, after the Responding Party issued a six-month site ban against the Applicant – Responding Party asserted that site ban was solely in response to Applicant’s safety violations, namely, entering another contractor’s “red-taped” zone on the site, without the required permission by the contractor, contrary to site policy - Applicant denied that he violated the red-tape policy and claimed that ban was a reprisal against him because as a union steward and health and safety representative, he had raised many health and safety concerns - Responding Party asserted that it was not his employer and therefore section 50 did not apply, and that in any event the ban was not motivated in any way by the Applicant’s health and safety activities - Board concluded that Responding Party had conducted a bona fide investigation based on complaints at the site, and that there was nothing suggesting animus against the Applicant for any reason – No causal connection between the site ban and the Applicant’s health and safety activities – No need to address question of whether

Responding Party should be considered the “employer” for the purposes of the *Act* — Application dismissed.

CURTIS BRYCE RE: **NOVA CHEMICALS CORPORATION**; OLRB Case No. 0806-22-UR; Dated March 11, 2024; Panel: Patrick Kelly (33 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.
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### Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
<b>Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario</b> Divisional Court No. 131/24	2442-22-U	October 31, 2024
<b>A. &amp; F. Di Carlo Construction Inc.</b> Divisional Court No. 657/23	0614-23-ES 0638-23-ES	July 10, 2024
<b>Errol McHayle</b> Divisional Court No. 013/24	1396-22-U	September 11, 2024
<b>Four Seasons Site Development</b> Divisional Court No. 661/23	0168-17-R	September 25, 2024
<b>Bradford West Gwillimbury Public Library</b> Divisional Court No. 611/23	1523-23-FA	September 10, 2024
<b>Jennifer Trumble</b> Divisional Court No. DC-23-00002813-0000 – PEHT (Ottawa)	1566-21-PE	May 22, 2024
<b>Robert Currie</b> Divisional Court No. 365/23	0719-22-UR 1424-22-UR	July 23, 2024
<b>Red n' Black Drywall Inc.</b> Divisional Court No. 350/23	1278-19-R	Dismissed
<b>Mina Malekzadeh</b> Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	May 1, 2024
<b>Simmering Kettle Inc.</b> Divisional Court No. DC-22-00001329-00-JR - (Oshawa)	0012-22-ES	Pending
<b>Susan Johnston</b> Divisional Court No. 934/21	0327-20-U	Motion for Leave to Appeal to Court of Appeal Dismissed
<b>Candy E-Fong Fong</b> Divisional Court No.	0038-21-ES	Pending
<b>Symphony Senior Living Inc.</b> Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
<b>Joe Mancuso</b> Divisional Court No. 28291/19 <span style="float: right;">(Sudbury)</span>	2499-16-U – 2505-16-U	Pending
<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

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<b>RRCR Contracting</b> Divisional Court No. 105/19	2530-18-U	Pending
<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>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