ISSN 1712–4506 (Online)

Ontario Labour Relations Board

HIGHLIGHTS

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March 2024

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 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.

Construction Industry - Unfair Labour Practice – Interpretation - Union brought unfair labour practice involving the operation of Ontario Regulation 98/16 to the *Labour Relations Act, 1995* (the "Regulation") – Board considered definition of "construction project" in the context of the Regulation, which sets out subcontracting obligations on EllisDon for construction projects outside of Board Areas 2 and 8 in the industrial, commercial and institutional sector valued at $20,000,000 or less – Board found that "construction project" is a term used colloquially and does not have a clear, ordinary meaning – Board concluded that the purpose of the Regulation was to separate "smaller projects" from "big projects" – The work at issue in this application was a discrete piece of construction work that formed part of a larger project valued at over $20,000,000 – Parsing out or subdividing large projects into smaller ones has the effect of losing the labour relations benefit of certainty – The work at issue is an integrated and necessary part of the project as a whole for which the Employer is responsible – Work at issue was thus not in violation of subcontracting obligations under the Regulation – Application dismissed

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 586, RE: **ELLISDON CORPORATION**; OLRB Case No. 0624-23-U; Dated February 1, 2024; Panel: Lindsay Lawrence (13 pages)

Displacement application for certification filed under the *Labour Relations Act, 1995* – Dispute arose concerning voting eligibility of employees on layoff or leave for over two years – Incumbent Union and Employer argued that anyone on the recall list who voted should be entitled to have their vote counted – Applicant Union argued that only those working at least one shift per week for seven out of the 13 weeks before the date of the application ought to be eligible to vote – Board reviewed history of its approach to voter eligibility - Board discussed its previous use of the "30/30 rule" and concluded that a modified 30/30 rule was appropriate in this case – Voting eligibility was confined to those who worked on the application filing date as well as those who worked at least once in the thirty days before and who had a reasonable expectation of working at least once in the thirty days after the application filing date – Modified 30/30 rule encapsulates the policy that decision-making on unionization should be made by employees working in the period surrounding the

application date – Including employees on indefinite layoff or away from the workplace for long periods of time does not serve the interests of workplace democracy – Active and current employees should be making decision around unionization and doing otherwise undermine the ability to organize – In the circumstances of this case, however, there was no way to determine who had a reasonable expectation of working at least once in the thirty days after the application filing date, so voters who worked at least once in the thirty days before and in the thirty days after the application filing date would be eligible - Parties were directed to proceed in agreeing on and counting votes of eligible voters who meet this criteria – Matter continues

TORONTO HOSPITALITY EMPLOYEES UNION – CSN (THEU-CSN), RE: **FAIRMONT ROYAL YORK**; OLRB Case No. 0186-22-R; Dated February 2, 2024; Panel: C. Michael Mitchell (133 pages)

Sale of Business – Related Employer - Certification - NOWU filed an application under sections 1(4) and 69 of the *Labour Relations Act, 1995* asserting that HRH and HM were a single employer, or that a sale of business had occurred from HRH to HM – SEIU later filed certification application seeking to certify a bargaining unit of employees at HM – HRH, HM and SEIU moved to dismiss the s. 1(4)/69 application without a hearing for failing to set out a *prima facie* case for remedies sought – Board found that the s. 1(4)/69 application as originally pled and new facts later asserted did not contain any pleadings of material fact which set out a *prima facie* case for remedies sought – NOWU sought to file additional facts after SEIU certification application was filed - Board refused to grant leave to NOWU to amend its application to include new facts not in existence at the time of its application – Granting leave would cause real and substantial prejudice to SEIU in the certification application – NOWU was instead permitted to file a fresh application and any such application will be considered in light of the outcome of the certification application – Sale of business/related employer application dismissed – Board directed ballots to be counted in the certification application. NATIONAL ORGANIZED WORKERS UNION, RE: HUMBER RIVER HOSPITAL, HUMBER RIVER HOSPITAL CORPORATION AND **HUMBER MEADOWS LONG-TERM CARE HOME**; OLRB Case Nos. 0090-23-R and 1165-23-R; Dated February 27, 2024; Panel: Timothy P. Liznick (23 pages)

Termination application – Procedural Issues – Timeliness - Applicant sought to terminate the Union's bargaining rights under the *Labour Relations Act, 1995* (the *"Act"*) – Union asserted that the application was untimely - Parties disputed whether or not the collective agreement expired on the date set out in the agreement - Board found that the Applicant has the onus to establish that the application is timely and that any party seeking to establish an expiration date other than that contained in the collective agreement has a heavy onus – Union sent notice to bargain and applied for appointment of a conciliation officer prior to the expiry date in the collective agreement – Conciliation officer was appointed - Union later advised Employer that it believed there was an error in the collective agreement and it actually expired one year later – No objection to the appointment of the conciliation officer was raised at the time of appointment – Section 67(2) of the *Act* contains mandatory language with respect to the timeliness of termination applications – Once the Minister appoints a conciliation officer, the requirements of section 67(2) become operable – The Board has no discretion under the *Act* to contest the appointment of a conciliation officer – The appointment of the conciliation officer made the application untimely – Application dismissed

KELLY DAVIDSON, RE: INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, RE: **GFL ENVIRONMENTAL INC**.;

OLRB Case No. 0482-23-R; Dated February 2, 2024; Panel: Paul Young (17 pages)

Unfair Labour Practice – Practice and Procedure - Deferral to Arbitration - Applicant asserted that the Employer violated section 70 of the *Labour Relations Act, 1995* by interfering with the ability of an elected official to perform her duties on behalf of the Society – Employer asserted that the Board should defer the matter to arbitration – Under the applicable collective agreement, the parties were to establish a joint standing committee to discuss benefit related issues or grievances and any unresolved issues may be referred to arbitration – Parties had dispute over one elected union official's participation in a particular issue that was before the committee – Applicant filed grievances against Employer in relation to the dispute – Employer did not demonstrate that issues raised in the application could be disposed of through arbitration – Allegations that the Employer undermined the Union's institutional role falls squarely within the purview and expertise of the Board – Applicable collective agreement does not require the parties to resolve an alleged violation of the *Act* at arbitration – Board declined to defer matter to grievance arbitration - Matter continues

SOCIETY OF UNITED PROFESSIONALS, IFPTE 160, RE: **HYDRO ONE LIMITED**; OLRB Case No. 0316-23-U; Dated February 29, 2024; Panel: Derek L. Rogers (13 pages)

Unfair labour practice – Statutory Freeze – Bad Faith Bargaining - Union filed unfair labour practice applications alleging that the Employer violated sections 17, 70 and 86 of the *Labour Relations Act, 1995* – While the parties were in bargaining for a renewal agreement, the Employer delivered a document to bargaining unit members indicating that qualification for long term disability benefits would change from a two-year "own occupation" period to an "any occupation" requirement from the start of disability, and that premiums would increase by 50% - Employer argued that this change was within the reasonable expectation of employees and did not violate the statutory freeze - Board found that the removal and premium increases were significant changes not made in the ordinary course of business nor were they within the reasonable expectation of the parties – Previous negotiations in bargaining led to a reasonable expectation by the Union that any future changes to benefits would be made through bargaining – Bound found that the Employer's failure to disclose timely information regarding discussions of the policy and premium changes constituted bargaining in bad faith – Board determined it was not necessary to consider whether Employer interfered with the Union – Employer ordered to maintain the employee benefit plan as it existed at the time of notice to bargain, so long as s. 86 applied - Applications allowed

ONTARIO PUBLIC SERVICE EMPLOYEES UNION/ SYNDICAT DES EMPLOYÉS DE LA FONCTION PUBLIQUE DE L'ONTARIO, RE: **DYNACARE GAMMA LABORATORY PARTNERSHIP DBA DYNACARE**; OLRB Case Nos. 1966-23-U and 2084-23-U; Dated February 5, 2024; Panel: Brian D. Mulroney (26 pages)

COURT PROCEEDINGS

Judicial review – Duty of Fair Representation – Delay – Applicant's duty of fair representation complaint dismissed as making out no *prima facie* case for the remedies sought – Request for reconsideration also dismissed – Motion to permit the late filing of an application for judicial review, brought eight months beyond the 30-day time limit set out in the *Judicial Review Procedure Act* ("*JRPA*") – Section 5(2) of the *JRPA* permits relief against the time limit where "there are apparent grounds for relief and no substantial prejudice or hardship will result" – in considering "apparent grounds for relief", the Court is to consider the

length of the delay and any explanation offered for it, as well as the substantive merits of the application for judicial review - Single judge of the Divisional Court dismissed motion - Applicant brought motion to have a three-judge panel set aside judge's decision - Applicant filed affidavit evidence with motion to panel - Court determined that affidavit evidence was not admissible - Court determined that motion judge made no palpable and overriding error in exercising her discretion to not grant an extension of time - Judge weighed relevant factors of the length of the delay, merit of the underlying application and prejudice to other parties - Motion dismissed

YIMING LIU, RE: ONTARIO LABOUR RELATIONS BOARD, HOLIDAY INN TORONTO DOWNTOWN CENTRE AND UNITE HERE LOCAL 75; Divisional Court File No. 465/23; Dated February 29, 2024; Panel: Edwards, Sachs, and Davies JJ. (5 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
Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario Divisional Court No. 131/24	2442-22-U	Pending
A. & F. Di Carlo Construction Inc. Divisional Court No. 657/23	0614-23-ES 0638-23-ES	Pending
Errol McHayle Divisional Court No. 013/24	1396-22-U	September 11, 2024
Four Seasons Site Development Divisional Court No. 661/23	0168-17-R	September 25, 2024
Bradford West Gwillimbury Public Library Divisional Court No. 611/23	1523-23-FA	September 10, 2024
Jennifer Trumble Divisional Court No. DC-23-00002813-0000 – PEHT (Ottawa)	1566-21-PE	May 22, 2024
Robert Currie Divisional Court No. 365/23	0719-22-UR 1424-22-UR	July 23, 2024
Red N' Black Drywall Inc. Divisional Court No. 350/23	1278-19-R	March 5, 2024
All Canada Crane Rental Corp. Divisional Court No. 037/23	1405-22-G	Dismissed Motion for Leave to Appeal Dismissed – January 17, 2024
Mina Malekzadeh Divisional Court No. 553/22	0902-21-U 0903-21-UR 0904-21-U 0905-21-UR	May 1, 2024
Simmering Kettle Inc. Divisional Court No. DC-22-00001329-00-JR - (Oshawa)	0012-22-ES	Pending
Susan Johnston Divisional Court No. 934/21	0327-20-U	Motion for Leave to Appeal to Court of Appeal
Candy E-Fong Fong Divisional Court No.	0038-21-ES	Pending
Symphony Senior Living Inc. Divisional Court No. 394/21	1151-20-UR 1655-20-UR	Pending
Joe Mancuso Divisional Court No. 28291/19 **(Sudbury)**	2499-16-U – 2505-16-U	Pending

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The Captain's Boil Divisional Court No. 431/19	2837-18-ES	Pending
EFS Toronto Inc. Divisional Court No. 205/19	2409-18-ES	Pending
RRCR Contracting Divisional Court No. 105/19	2530-18-U	Pending
China Visit Tour Inc. Divisional Court No. 716/17	1128-16-ES 1376-16-ES	Pending
Front Construction Industries Divisional Court No. 528/17	1745-16-G	Pending
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
Valoggia Linguistique Divisional Court No. 15–2096 **(Ottawa)**	3205–13–ES	Pending