



What's New in HR Law

Exclusive or Non-Exclusive? Labour Board Finds Specialty Contractors Can Play the Field

May 25, 2022 | By [Natalie Garvin](#)

Bottom Line

In its recent decision of [Bruce Power LP](#), 2022 CanLII 5411 (ON LRB), the Ontario Labour Relations Board (the “Board”) redefined what it means for a contractor to be a specialty scaffolding contractor. This is a significant change for construction labour law, as it departs from the previous perception that a contractor must perform “nothing but scaffolding” to be considered a specialty scaffolding contractor. The decision also clarifies the difference between scaffolding tending work and general tending work.

Labour Board Issues Important Decision Affecting Scaffolding Contractors

In [Bruce Power LP](#), the Board was asked to resolve two work assignment (or “jurisdictional”) disputes between two rivalrous unions: the Labourers’ International Union of North America, Local 1059, and the Labourers’ International Union of North America, Ontario Provincial District Council (the “Labourers”), and United Brotherhood of Carpenters and Joiners of America, Local 2222 (the “Carpenters”).

The Work in Dispute

The work in dispute in the first application involved, in general terms, the tending, handling, moving, unloading and loading of scaffolding materials; radiation cleaning and monitoring of scaffolding materials;

This article is for the purposes of only general information and does not constitute legal advice or opinion.

and organizing scaffolding materials. This work was conducted in relation to the Breathing Air Project at the Bruce Power Nuclear Generating Station.

Similar work was in dispute in the second application. That application concerned, in general terms, the tending, handling, moving, unloading and loading of scaffolding materials; radiation cleaning and monitoring of scaffolding materials; organizing scaffolding materials; the wiping, inventorying and the transportation of scaffold material; and the tending, erecting and hoarding of Contamination Containment Areas. The work was also conducted at the Bruce Power Nuclear Generating Station, but in relation to Bruce Power's Major Component Replacement ("MCR") Project.

In both applications, the disputed work was performed by members of the Carpenters' bargaining unit who were employed by AlumaSafway Inc. and Aluma Systems Canada Inc. (collectively, "Aluma").

The parties disagreed over whether the work in dispute should be divided into two types of work: scaffolding tending work and radiation cleaning and monitoring work.

Employer Practice

Specialty Scaffolding Contractor

The preliminary issue of whether Aluma was a specialty scaffolding contractor arose when the Board was considering employer practice and area practice, important factors in jurisdictional disputes to determine how a specific employer or the industry normally assigns the disputed work. Aluma claimed that it was a scaffolding, insulation and painting (SIP) contractor. The Labourers argued that Aluma was a multi-trade contractor, as it did not have the exclusivity in work necessary to be considered a specialty scaffolding contractor.

Applying basic labour relations principles, the Board determined that the definition of "specialty" does not require exclusivity but, rather, the development of expertise in a field through time and effort. From this, the Board held that a scaffolding contractor does not need to perform *only* scaffolding work and, instead, the performance of scaffolding work on a "steady, continuous or long term basis" was sufficient. This conclusion deviates from the Board's established case law, which had adopted a "nothing but scaffolding" standard for identifying a specialty scaffolding contractor.

Since Aluma spent a significant number of hours performing scaffolding work and had expertise in the field, the Board found it to be a specialty scaffolding contractor. Although Aluma also performed insulation and painting work, such work was a small percentage of its scaffolding offerings and had no impact on the Board's analysis.

Jurisdiction over the Radiation Cleaning and Monitoring Work

After determining Aluma's status as a specialty scaffolding contractor, the Board found that the disputed work should be separated into two categories: scaffolding and tending work and radiation cleaning and monitoring work. The separation was justified by the history of past contracts and mark-up meetings, the separation of the work when it was tendered, as well as prior Board decisions.

The Board ultimately concluded that the radiation cleaning and monitoring work belonged to the Carpenters. In terms of area practice, the decontamination of scaffolding equipment and materials had been performed by both the Labourers and Carpenters. However, Aluma's employer practice favoured the assignment of work to the Carpenters. The typical practices of Bruce Power LP (as general contractor) and its subcontractor were not considered in the analysis, in accordance with the Board's custom when

adjudicating work on projects governed by the Electrical Power Systems Construction Association collective agreement.

Trade Tending vs General Tending

In its decision, the Board also clarified the distinction between general tending and trade tending performed by scaffolding contractors. Specifically, the Board held that trade tending covers activities at the scaffold (including the dismantling of the scaffolding) and general tending is the movement of materials to and from the scaffold.

The work in dispute involved the inspection, organization, and sorting of all scaffold components, which were integral to dismantling and ensuring the safe reuse of the scaffolding. As a result, the Board found that this work constituted trade tending. The Board then found that this work was properly assigned to the Carpenters, based on the idea that “where a function or task is performed as scaffolding is going up is also performed when it is being taken down, that function or task ought to be assigned to the same trade.” Only the general tending work was determined to belong to the Labourers.

Check the Box

It remains to be seen whether the Board’s new definition of specialty scaffolding contractors will stay authoritative or whether the Board will return to its previous definition of the classification in subsequent decisions.

Nevertheless, this decision, if followed, demonstrates the Board’s adaptability to changes in the construction trades and factors relevant to the assignment of work. This positively reflects on the Board’s purpose in adjudicating jurisdictional disputes, which is to replicate, as best as possible, the decision that a fair-minded contractor would make when considering its own practices, economies and efficiencies, and other business-related factors. Overall, the Board’s decision provides more flexibility to scaffolding contractors with respect to the work they can claim.

Need More Information?

For more information or assistance with determining how the *Bruce Power LP* decision may affect your company’s assignment of work or for general assistance navigating a jurisdictional/work assignment dispute, contact [Natalie Garvin](#) at 416.408.5512, or your regular lawyer at the firm.



Toronto
Bay Adelaide Centre
333 Bay Street
Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca



London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca



Hamilton
1 King Street West
Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca