CITATION: SkipTheDishes Restaurant Services Inc. v. Canadian Union of Postal Workers, 2025 ONSC 1399
DIVISIONAL COURT FILE NO.: 378/24
DATE: 20250318

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

N. Backhouse, D. L. Corbett, S. Nakatsuru, JJ.

BETWEEN:	
SKIPTHEDISHES RESTAURANT SERVICES INC Appellant	*Richard Charney* and *Samantha Cass*, for the Applicant
- and -	
CANADIAN UNION OF POSTAL WORKERS and ONTARIO LABOUR RELATIONS BOARD Respondent	*Ryan White, Jackie Esmonde*, and *Clemence Thabet*, for the Respondent CUPW *Andrea Bowker*, for the Respondent OLRB
	HEARD at Toronto: February 13, 2025

REASONS FOR DECISION

S. Nakatsuru J.

A. OVERVIEW

[1] Some people who deliver food and alcohol to households in the city of Hamilton want to form a union. The subject business targeted by the union is SkipTheDishes Restaurant Services Inc. (“Skip”). Skip operates a well-known online delivery platform used by its customers for such deliveries.

[2] On April 3, 2024, the respondent, the Canadian Union of Postal Workers ("CUPW"), filed an application under the *Labour Relations Act*, 1995, S.O. 1995, c. 1 (the "*Act*") to be certified as the exclusive bargaining representative for individuals who work as food couriers for the applicant, Skip. The certification application was properly served and received by the legal representative at the registered office address identified on Skip's incorporation documents.

[3] Under s. 8.1 of the *Act*, employers have the option of filing an objection to a trade union's estimate in the certification application of the number of employees in the proposed bargaining unit. But it must do so within two days from the date the application is served. Skip missed the statutory deadline for objecting to the certification application by four days on the grounds that, though service was made, it did not become known to Skip until after the deadline had passed. By then the Ontario Labour Relations Board ("Board"), as required by law, had scheduled a vote to determine whether the majority of couriers wished to be represented by CUPW.

[4] By the decision dated June 7, 2024, Board Vice-Chair Danna Morrison declined to consider Skip's notice to challenge the certification application pursuant to s. 8.1 of the *Act*. Skip seeks judicial review of that decision.

[5] Skip submits that the Vice-Chair's decision is unreasonable and asks this Court to quash the decision and order the Board to permit Skip to rely on s. 8.1 and to challenge CUPW's estimate of the size of the proposed bargaining unit.

[6] CUPW responds that the decision was reasonable and, in any event, both CUPW and the Board submit that the judicial review is premature.

[7] For the following reasons, the judicial review application is dismissed because of prematurity. As a result, it is unnecessary to deal with the merits of the judicial review.

B. BACKGROUND

1. The Legislative Framework

[8] Collective bargaining rights in Ontario are obtained by filing evidence that a union has the support of 40 percent of its proposed bargaining unit: s. 8 of the *Act*. This 40 percent threshold is the door to the certification process. If the Board is satisfied that this threshold has been met, the application for certification proceeds down the statutory path which includes a vote in which every proposed member of the bargaining unit is entitled to vote. If the 40 percent threshold is not met, the door to certification remains closed.

[9] The statutory timelines for the certification process are short. Normally, the Board administers a vote within five days of an application being filed.

[10] Employers can object to a certification application pursuant to s. 8.1 of the *Act* where they disagree with a trade union's estimate of the number of people in the bargaining unit, but it must do so quickly. The relevant portions of s. 8.1 reads:

> **Disagreement by employer with union's estimate**
>
> 8.1 (1) If the employer disagrees with the trade union's estimate, included in the application for certification, of the number of individuals in the unit, the employer may give the Board

a notice that it disagrees with that estimate.

….

Deadline for notice

(3) A notice under subsection (1) must be given within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification.

[11] Objections must identify the number of individuals in the unit proposed by the trade union, describe the bargaining unit proposed by the employer (if any), and, if it proposes an alternate bargaining unit, provide an estimate of the number of people in the alternate unit.

[12] When an objection is made, the Board will administer the vote but seal the ballot box until it has determined both the appropriate bargaining unit and its members. If the objection is unsuccessful, the Board simply counts the ballots cast. If the objection succeeds, the vote is a nullity, and all ballots are destroyed.

[13] A union faces consequences if it loses a vote or, alternatively, withdraws an application once a vote has commenced. If a trade union loses a vote, they are statutorily barred from bringing an application for a bargaining unit of any employee that was in the bargaining unit proposed in the original application for a period of one year: s. 10(3) of the *Act*.

[14] There is a similar mandatory one-year bar where a trade union withdraws its application after a representative vote has taken place but before all ballots have been counted: s. 7(10) of the *Act*. As a result, if a trade union believes that it has insufficient support to win a vote and accordingly withdraws its application, it will be met with a mandatory bar of one year if the decision to withdraw is made after the voting period has commenced.

2. The Service of the Certification Application

[15] On April 3, 2024, CUPW hand-delivered the certification application to the law firm LaBarge Weinstein LLP in Kanata, Ontario, a firm that had previously represented Skip. The Kanata address is listed as the "Registered Office Address" on the Federal Corporation Information Report and as the "Registered or Head Office Address" and the "Principal Place of Business" on the Ontario Corporation Profile Report, each of which was filed on behalf of Skip in accordance with the applicable legislative requirements.

[16] After receiving the certification application, the law firm emailed the primary contact at the applicant company, Ms. Ambre Anjoubault, to advise Skip of the application but received an automatic reply stating that the email no longer exists. In that email to Skip, the law firm advised that it was not happy in continuing to receive service of similar materials and advised that Skip's address for service should be changed. After the bounce back email, it does not appear anything further was done.

[17] On April 8, 2024, the Board, differently constituted, noted that Skip, although duly served with the application material on April 3, 2024, according to the certificate of delivery filed by CUPW, failed to file its response within the time stipulated by Rule 9.5 of the Board's Rules of Procedure. The Board directed that a vote be taken of the individuals in the voting constituency. The constituency was defined as:

> all employees performing food and alcohol delivery services, including direct employees and/or dependent contractors for Skipthedishes Restaurant Services Inc. in the City of Hamilton, Ontario, save and except any managers, positions above the rank of manager, office staff, marketing and/or sales staff, technical and/or information technology staff, human resources staff, reception and/or administrative staff, and accounting staff.

[18] On April 9, 2024, an officer of the Board contacted Norton Rose Fulbright Canada LLP, having been aware that the firm had represented Skip in another legal matter. Skip contends that this is when it first had actual knowledge of the certification application. It then began compiling its response that there were no employees, only independent contractors and, in the alternative, a list of employees that it submits belonged in the proposed bargaining unit.

[19] On April 10, 2024, counsel for Skip wrote to the Board and advised that it had been retained on April 9, 2024, and that the certification application did not come to their attention until this date.

[20] On April 11, 2024, Skip filed its response and accompanying materials, together with a s. 8.1 notice. It set out its position that the application was not properly delivered and therefore, ought to be dismissed on that basis. Alternatively, the applicant requested that the Board accept its response, including the s. 8.1 notice. That same day, CUPW filed correspondence taking the position, among other things, that the Board ought not to accept the late-filed response or to consider the s. 8.1 notice or any other issues raised therein.

3. The Procedural Background

[21] In a decision dated April 11, 2024, the Board held that it was not prepared to determine the issues raised by the parties in their respective correspondence to the Board nor to delay or stop the vote, which, by that point, was underway. The parties were provided the opportunity to file written submissions regarding whether the Board should order the ballot box sealed and the ballots individually segregated pending the determination of the issues raised by the parties.

[22] The vote commenced on April 11, 2024, and concluded on April 17, 2024. On April 16, 2024, the Board ordered that the ballot box be sealed, and the ballots individually segregated until the Board ordered otherwise.

[23] The following issues were brought to the hearing on May 13, 2024, before Vice Chair Morrison: (1) Was the application properly delivered? (2) Was the s. 8.1 notice filed in a timely

manner? (3) Should the Board exercise its discretion (if it has such discretion) to accept the late filed response and/or s. 8.1 notice?

C. THE DECISION OF THE BOARD

[24] In her June 7, 2024, decision, Vice Chair Morrison decided all three issues in favour of CUPW, save that she accepted Skip's late filed response for the purpose of determining the appropriate bargaining unit and/or to determine whether the couriers are dependent or independent contractors.

[25] First, the Vice Chair found that the application was properly delivered to the Kanata law firm on April 3, 2024. CUPW was entitled to rely on the last registered corporate address that was on file and obtainable through a Corporation Profile Report. CUPW took the necessary steps to ascertain the address. Moreover, it was Skip that carried the onus to ensure that the information contained in its corporate filings was up to date and accurate, which it did not do.

[26] Second, the Vice Chair, in relying on Rule 6.7 of the Board's Rules of Procedure, held that the application was received by Skip on April 3, 2024. This was true regardless of when Skip's corporate office received a copy of it. Therefore, Skip's s. 8. 1 notice ought to have been filed no later than April 5, 2024. As it was not, the notice would not be considered.

[27] Finally, the Vice Chair determined that, assuming the Board had the discretion to relieve against the Rules' strict application where it considers it advisable, the circumstances of this case did not warrant exercising this discretion. Looking at the relevant factors, she held that the four-day delay was significant because Skip did not act quickly upon becoming aware of the application. Skip's reason for the late filing was not acceptable given that it was the responding party, not the applicant, which bore the risk when it did not monitor its own methods of receiving correspondence. Skip had set up a system whereby documents could be delivered to the Kanata law firm's address, and it did so at its own peril. Finally, accepting Skip's explanations and exercising discretion in Skip's favour would prejudice CUPW. On the other hand, Skip's prejudice was of its own making, and any prejudice it suffered was outweighed by CUPW's.

[28] On this judicial review, Skip only challenges the Vice Chair's decision on the second and third issue. They raise no objection to her finding that the certification application was properly delivered.

D. ANALYSIS ON PREMATURITY

[29] Vice Chair Morrison's decision is an interlocutory one. Proceedings in the certification application are scheduled before the Board and remain ongoing. The Board has booked multiple hearing days to consider whether the couriers are employees/dependent contractors or independent contractors. Even apart from the independent/dependent contractor determination, Vice Chair Morrison expressly left it as a live issue whether Skip will be allowed to make submissions on whether any individual courier is properly in the voter constituency so that their ballot will be

counted in the application.[1] Put differently, it remains to be decided whether Skip will be permitted to add to or challenge the voters' list.

[30] When it comes to the judicial review of an interlocutory decision of an administrative tribunal, the law is clear: absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted: *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561, at para. 69 citing *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] F.C.R. 332, at para. 31; *College of Physicians and Surgeons of Ontario v. Kilian*, 2024 ONCA 52, at paras. 28-29.

[31] Skip submits that this case is exceptional. It relies upon factors identified by the caselaw that guide the exercise of discretion in hearing a judicial review of an interlocutory decision:

> 1. The hardship to the applicant if the administrative proceedings continue without the Court's intervention;
>
> 2. The waste that will result if the applicant has to wait until the end of the administrative proceedings to bring an application for judicial review;
>
> 3. Delay in the administrative proceedings if the Court decides to hear the application for judicial review now;
>
> 4. Whether fragmenting the process and the issues will create additional litigation; and
>
> 5. The strength of the application for judicial review.

See *Whearty v. Waypoint Centre for Mental Health Care*, 2024 ONSC 5638 (Div. Ct.), at para. 9, citing *Toronto Transit Commission v. Amalgamated Transit Union Loc 113*, 2020 ONSC 2642 (Div. Ct.), 150 O.R. (3d) 602, at para. 11.

[32] The doctrine of prematurity, as it has developed in the law of judicial review prevents the fragmentation of administrative proceedings, reduces costs and delays, and ensures that judicial review is used as a last resort and only after the administrative decision-making process has been exhausted. Further, allowing the underlying proceeding to complete its course, respects the role of the administrative decision-maker: *Canadian Union of Postal Workers v. Canada Post Corporation*, 2024 ONSC 5924 (Div. Ct.), at para. 6; *Sudbury and District Health Unit v. ONA*, 2023 ONSC 2419 (Div. Ct.), at para 11; *C.B. Powell Limited*, at paras. 30-33; *Volochay*, at paras. 68-69; *Malekzadeh v. Ontario Labour Relations Board*, 2024 ONSC 2559 (Div. Ct.), at para. 7.

[1] June 7, 2024, OLRB decision at paras. 73-74; September 5, 2024, OLRB decision at paras. 21-23.

[33] Skip submits that s. 8.1, though a preliminary step in the certification process, is a critical gateway such that its denial causes Skip much hardship and would lead to substantial waste. This certification proceeding will be complex, costly, and involve significant resources. The Board ordered considerable production and has scheduled five hearing dates with respect to just the first phase of the proceedings regarding the couriers' employment status. On the other hand, Skip argues that the s. 8.1 issue is discrete and if the objection is successful, it would dispose of the certification application. Additionally, Skip submits that allowing the certification process to proceed would give CUPW's application an unsubstantiated air of legitimacy that may improperly skew a voter's perception when it comes to casting their ballot.

[34] I am not persuaded that the hardship and undue waste of resources is as significant as Skip argues.

[35] First, the submission regarding a prejudice based upon providing unwarranted "legitimacy" to the process, is amorphous, speculative, and unrooted in any evidence or reasonable inference from the circumstances. Moreover, the vote has now been completed and the certification process has moved on.

[36] Second, it is apparent that success in the judicial review will not bring the certification process to an end. In the s. 8.1 notice that Skip wished the Board to consider, it made two submissions regarding the size of the proposed bargaining unit: (1) that there is in fact zero members in the proposed bargaining unit because couriers are independent contractors and not employees or dependent contractors; (2) alternatively, that the proposed bargaining unit is much larger than CUPW estimated in its certification application. The latter issue will depend upon whether a courier has a sufficient enough connection to the unit to be classified as a member. It is not simply a mathematical matter.

[37] In my view, even if the Board properly entertained the s. 8.1 notice, these issues would remain. The accuracy of the voter's list, contested by Skip in both ways, must be litigated before the Board as the legal struggles regarding certification continue – whether the judicial review is successful or not. Said differently, while the outstanding issues currently before the Board may not be exactly synonymous with the ones raised by the s. 8.1 notice, what is clear is that voter eligibility, the crux of the s. 8.1 notice, remains to be determined, is factually and legally intertwined with the issues currently before the Board, and will have to be litigated regardless. If the s. 8.1 notice is remitted by this Court to the Board, it is a matter of conjecture as to the order in which the Board will determine the issues, how it will do so, and whether and what issues it might decide discretely. I agree with CUPW and the Board, it is hard to envision a short-cut to the resolution of these issues irrespective of whether this judicial review proceeds.

[38] If the certification application proceeds to its conclusion, the Board may ultimately decide that the couriers are independent contractors and dismiss the certification application. If the certification application fails for other reasons, i.e., insufficient votes, no judicial review on the grounds of a failure to accept the s. 8.1 notice would arise. If the union is certified, Skip may still seek judicial review of the final decision including the grounds raised in this judicial review. However, the court on that review will have the advantage of the full record of the Board's

decisions, “suffused with expertise, legitimate policy judgments and valuable regulatory expertise”: *C.B. Powell Limited*, at para. 32.

[39] Skip submits that this application for judicial review has not affected or delayed the Board’s ongoing proceedings. The vote has already occurred, the ballots are sealed, and five hearing dates in February and April, 2025, are scheduled to deal with the issue of the couriers’ status. While Skip submits that there is no indication that this judicial review would delay the administrative proceedings further, if Skip is successful on the judicial review, the matter will be remitted to the Board for reconsideration of the s. 8.1 notice leading to fragmentation and delay: *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at paras. 106-108 citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 141. Alternatively, if unsuccessful, Skip could well seek leave to appeal to the Ontario Court of Appeal.

[40] The fragmentation concerns here are real. Prematurity concerns arise whenever judicial review is brought from an interlocutory decision: see, for example, *Holland, L.P. v. Labourers’ International Union of North America et al*., 2023 ONSC 870 (Div. Ct.), at para. 10; *Rail Cantech Inc. v. Labourers’ International Union of North America*, 2013 ONSC 7236 (Div. Ct.), at paras. 6-8 (where the preliminary issue is the administrative tribunal’s jurisdiction over the matter); *Canadian Union of Postal Workers v. Canada Post Corporation*, at para. 14 (where a limitation period in a collective agreement is involved). The fragmentation concerns in the case at bar are real: given the factual matrix raised in this case, the argument to exercise this Court’s jurisdiction is less compelling than in the above-mentioned cases.

[41] Regarding the final factor, it is neither necessary nor prudent to probe deeply into the strength of the substantive merits of this judicial review. It suffices to say that, although judicial review is robust, it remains anchored in the principle of judicial restraint that demonstrates respect for the distinct role of administrative decisionmakers: *Vavilov*, at para. 13. Giving greater support to that principle is the long-standing jurisprudential commitment affording labour relations tribunals the highest degree of deference: *Mulmer Services Ltd. v. LIUNA, Local 183,* 2023 ONSC 4716 (Div. Ct.), at para. 31; *Labourers’ International Union of North America, Local 183 v. GDI Services (Canada) LP,* 2020 ONSC 1018 (Div. Ct.), at para. 27; *Electrical Power Systems Construction Association v. Labourers’ International,* 2022 ONSC 2313 (Div. Ct.), at para. 14. This is especially the case when it comes to the Board’s interpretation of its home statute: *Turkiewicz*, at para. 77; *Enercare Home & Commercial Services Limited Partnership v. UNIFOR Local 975*, 2022 ONCA 779, 476 D.L.R. (4th) 342, at para. 64. I find that this factor does not counter the other considerations supporting the dismissal of this application on the grounds of prematurity.

[42] The applicant relied on caselaw where the Divisional Court exercised their discretion and found exceptional circumstances to permit judicial review of an interlocutory decision.[2] However, resort to these cases is not particularly helpful as the existence of extraordinary circumstances was assessed according to the specific facts presented in each case. On the facts of this case, unlike some of the cases Skip relied upon, I find that it does not make good labour relations sense to override the prematurity objections.

[43] In conclusion, there are no exceptional circumstances that justify this Court exercising its discretion to judicially review Vice Chair Morrison's interlocutory decision. Skip will be able to raise its substantive concerns during the ongoing certification process.

E. DISPOSITION

[44] The judicial review application is dismissed.

[45] As agreed to by the parties, Skip will pay CUPW $6,000 all inclusive in costs. No costs are sought by or are awarded against the Board.

"Nakatsuru J."

I agree: "Backhouse J."

I agree: "D.L. Corbett J."

Released: March 18, 2025

[2] The cases relied upon by Skip discuss threshold issues in various contexts: the issue of whether a grievance was arbitrable because the griever was not in the full-time bargaining unit but the parties consented to it being heard and the case had broad implications for educational institutions across the province (*Algonquin College v Ontario Public Service Employees Union*, 2017 ONSC 2500 (Div. Ct.); where an employer sought judicial review of an arbitrator's substantive award allowing the union's grievance but this had been bifurcated from remedy which was the only outstanding issue (*Nemak of Canada Corporation v. UNIFOR Local 200*, 2022 ONSC 1732 (Div. Ct.); an employer's objection that the application was barred by settlement where prematurity was not raised by the parties (*Brookfield Lepage Johnson Controls Facilities Management Services Ltd. v. Ontario Labour Relations Board*, 2007 CanLII 3481 (ON SCDC); where an individual manager was named as sole respondent in the union's unfair labour practice complaint and would suffer overwhelming prejudice if required to attend numerous days of hearing (*UFCW Canada v. Rol-Land Farms Limited*, 2008 CanLII 6652 (ON SCDC).

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