OLRB Case No: 1749-23-U

Submissions Regarding Respondent's Requests to Dismiss the Application

1. The Respondent Union has submitted that the Application should be dismissed because of unreasonable delay. (Paragraphs 58 and 59 of the Response)

2. The Respondent has submitted that the Application should be dismissed because Local 222's decisions "cannot be the subject of a section 74 complaint by PW employees and it ought to be dismissed." (Paragraph 62)

Submissions Regarding Prima Facie Case

3. In paragraph 60 the Union argues "The application cannot succeed because in it, the Applicants are complaining about the decisions made by their union in negotiations with a different employer, in respect of a different bargaining unit in which none of them is employed."

4. This assertion is inaccurate, and is a misstatement of the Applicants' position. The Applicants are not asserting that their union violated section 74 in the bargaining of the 2022 collective agreement between DRT and Unifor Local 222. The Application included information about the 2022 bargaining because this information is necessary background to understanding the situation facing PWTransit workers when their employer lost the contract to provide transit services in Whitby. This information also sheds light on the attitude or motivation of some members of the Local 222 leadership that is relevant to the actions they took (or didn't take) on behalf of the PWTransit workers.

5. The Applicants believe that Local 222 failed in its duty of fair representation to the PWTransit workers during the negotiation of the 2023 Memorandum of Agreement (MOA) between DRT, PWTransit, and Local 222.

6. For example, paragraph 6 of the Application states:

In the negotiation of the MOA the members of the PWT Unit of Unifor Local 222 were denied fair representation by Unifor and its Local 222 and subjected to treatment that violated the union's obligation to not act in a manner that is arbitrary, discriminatory, or in bad faith.

7. The Applicants further argue that Local 222 violated section 74 by failing to give proper consideration to the possibility of seeking a declaration of common employer and/or sale of business as a way to protect the interests of PWTransit workers, and in signing an undertaking to not seek such a declaration. The manner in which Local 222 made these decisions was arbitrary and in bad faith. In particular, Local 222 made these decisions without any consultation with the PWTransit workers – the ones directly affected by the potential loss of their jobs. Local 222 was dishonest with the members and unit leaders of the PWTransit Unit, hiding information from them, and refusing to give them any information about what was going on when they were asked. The lack of consultation, secrecy, and dishonesty displayed by Local 222 officials amounted to acting arbitrarily and in bad faith.

8. This case can be distinguished from the case cited by the Respondent. In Pomietlarz, the Applicants had moved from one bargaining unit to a second one. The applicants in that case filed a section 74 complaint when they were members of the second unit, and argued their union should have negotiated a different collective agreement in that unit. The negotiations were concluded prior to the complainants in that case becoming members of that unit.

9. In contrast, in this case the Applicants filed a complaint while they were members of the PWTransit Bargaining Unit, and the complaint deals with violations of their union's duty of fair representation to the PWTransit unit.

May 2023 Memorandum of Agreement

10. The Respondent union admits that meetings were held between management representatives of DRT, management representatives of PWTransit, and representatives of Local 222 in at least February, March, April and May 2023 to negotiate some terms of the integration of transit services in Whitby with the rest of

Durham region and the impact on the existing workers at PWTransit. (Response paragraph 39)

11. The discussions resulted in a negotiated Memorandum of Agreement (MOA) that was signed by DRT management, PWTransit management, and Local 222 on May 25 and May 30, 2023. (Response paragraph 44) At this time PWTransit was the employer of the Applicants.

12. These negotiations and subsequent MOA involved the employer of the PWTransit workers and had significant implications to their rights to the jobs the PWTransit workers were performing. We submit that the PWTransit workers were owed a duty of fair representation by their union in the negotiation of the MOA.

13. The Union seems to argue, without saying so explicitly, that their participation in these negotiations was as a representative solely of the DRT workers. The March 11, 2024 Decision by the Board, for example, states that the Union's position is that "the negotiations and memorandum of agreement that it reached with the DRT to 'contract-in' Whitby transit services was made wearing its 'DRT bargaining agent hat' and that it owed no duty of fair representation to the PWT Bargaining Unit in that context." (Decision paragraph 5)

14. If the Local 222 representatives who took part in these negotiations and signed the resulting agreement were wearing their 'DRT bargaining agent' hat, the question must be asked – who was wearing a 'PWTransit bargaining agent hat'? The Local 222 reps were the only union representatives present who could have represented the PWTransit workers. If they had no intention of acting as the representatives of the PWTransit workers, this amounts to a violation of their duty of fair representation to those workers.

15. The Application points out that Jeff Gray, Local 222 President, later told a group of PWTransit workers that he (Gray) was the one who had decided to exclude the Chairperson of the PWTransit Unit from the talks leading to the MOA. (Application paragraph 52)

16. The Application provides evidence that the PWTransit management representative at these negotiations expected the Chairperson of the PWTransit Bargaining Unit, Tim Thompson, to be present, and asked why he was not there. (Application paragraph 33)

17. The Union cannot argue that the PWTransit management representatives played no significant role in the negotiation of the MOA, since the final agreement contained obligations binding on PWTransit management, including among other items an undertaking to provide DRT with discipline records and eligibility validation for the DRT hiring process, an agreement to not file an application for common employer and/or sale of business, and an agreement to indemnify and hold harmless DRT for any claim from PWTransit workers not hired by DRT. (MOA paragraphs 2, 8) These undertakings also have serious implications for the rights of PWTransit workers.

18. There is ample evidence provided in the Application that the Union acted in ways that are violations of their duty to fair representation to the PWTransit workers in the way they went about negotiating the MOA.

19. Local 222 representatives were dishonest in their dealing with the Unit Reps of the PWTransit Unit, including Unit Chairperson Tim Thompson. Jeff Gray made repeated commitments to Tim Thompson that he would be involved in the discussions with DRT and PWTransit about the transition, and would be kept informed of any developments. None of these commitments were honoured. (Application paragraphs 26, 27, 29, 32, 41)

20. Jeff Gray and Local 222 had no meetings with Tim Thompson, any other PWTransit Unit reps, or any other PWTransit workers to discuss the impact on the workers of the transition, to discuss what actions the Union could take on their behalf, or to hear their concerns or suggestions.

21. Jeff Gray and Local 222 never informed Tim Thompson, any other PWTransit Unit reps, or any other PWTransit workers of what was being discussed or considered in the negotiations with DRT and PWTransit regarding the transition.

22. Specifically, Jeff Gray and Local 222 never informed Tim Thompson, any other PWTransit Unit reps, or any other PWTransit workers that Local 222 was considering signing an undertaking to not make application for a declaration of common employer and/or sale of business. Consequently, the workers directly involved had no opportunity to discuss what the implications to them would be, or to express their opinions on the proposed course of action, or to advocate any different direction.

23. In *Corporation of City of Thunder Bay*, [1983] OLRB Reports May 781 paragraph 86, the Board found that the Union had breached its duty of fair representation because of the way that it had restructured its bargaining committee:

> *In this case the evidence leads the Board to conclude that the by-law was departed from by the executive committee for the express purpose of limiting the access of the complainant group of employees to any meaningful voice in the bargaining committee.*

24. The actions of Local 222 in excluding the Chairperson of the PWTransit Unit from the negotiation of the MOA, and acting to prevent any members of the PWTransit Unit from having any knowledge of, or input to those negotiations must be seen likewise, as an effort to keep them from having a meaningful voice in matters that were of serious consequence to their employment and contractual rights.

25. Members of the PWTransit Unit, including Unit reps, raised issues with Jeff Gray about the transition and agreement being negotiated at the Local 222 membership meeting on June 1, 2023. At this time Jeff Gray knew that the MOA had been concluded and signed, but he refused to reveal any details of it to the PWTransit workers. He told them that he could not do so because there was a “non-disclosure agreement”. The Union Response, paragraph 40, states there was no such NDA, nevertheless those are the words used by Jeff Gray on June 1, 2023. The Union argues that the discussions between DRT, PWTransit and Local 222 “were premised on confidentiality”, but this does not explain why Jeff Gray refused to provide any details to the workers affected after the MOA was signed.

26. Even after the MOA was signed (on May 25 and May 30, 2023), the terms of the MOA were not shared with Tim Thompson, any other PWTransit Unit reps, or any other PWTransit workers. An incomplete summary of the terms of the MOA was provided to PWTransit workers by PWTransit management on June 12, 2023. The Union's Response is not correct in stating that "in June 2023 … the Applicants had full knowledge of the May 2023 agreement." (Response paragraph 59) In fact, the Applicants did not have a copy of the entire MOA until August 8, 2023 (Application paragraph 84).

27. On June 14, 2023 members of the PWTransit unit were invited to attend the Unifor Local 222 Union Hall to learn about the details of the MOA and the possibility of maintaining their jobs or being hired by DRT. This meeting was conducted by Jeff Gray and Ian Sinnott. The PWTransit workers were not informed that Local 222 had signed an undertaking to not file an application for a declaration of common employer or sale of business. This item of the MOA was not even mentioned. When PWTransit workers asked if they were guaranteed jobs with DRT, Ian Sinnott stated "If you meet the criteria, there is no reason they won't hire you." This was not an honest description of the terms of the MOA. Ian Sinnott certainly knew that DRT intended to hire for 35 full-time equivalent positions from the approximately 60 PWTransit workers providing Whitby transit service at the time the MOA was signed. (Application paragraph 71, Response paragraph 45)

28. On June 1, 2023 Jeff Gray told the PWTransit workers present "you're all going to get jobs," (Application paragraph 52). The Union's response states in paragraph 53 that, "Almost all PW employees have been hired by DRT." In fact, to date DRT has hired only 31 of the 44 Applicants.

29. Evidence was provided in the Application of animosity towards the Applicants expressed by Jeff Gray, including his accusation against Tim Thompson on June 1, 2023 that Thompson was "showboating" (paragraph 53), and the fact that Gray cancelled leaves of notice for 3 PWTransit reps to attend a scheduled meeting with

him on June 12 about the details of the agreement. Gray cancelled the leaves on June 6 without notice to the three reps (paragraph 56).

Application for a Declaration of Common Employer and/or Sale of Business

30. A union's duty of fair representation is laid out in section 74 of the Ontario Labour Relations Act:

> **Duty of fair representation by trade union, etc.**
> **74** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be. 1995, c. 1, Sched. A, s. 74.

31. The union's duty is to employees in the bargaining unit "in the representation of any of the employees in the unit." Representation is commonly understood to include collective bargaining and processing of grievances, but is not explicitly limited to those items.
32. The duty of fair representation should apply to the actions (or inactions) of a union in representing the rights and interests of employees in a bargaining unit under the OLRA. The Act provides that unions can apply to the OLRB for a declaration of common employer, or sale of business. These applications can be pursued to defend the interests of members of a bargaining unit represented by the union. As such, the decision of whether or not to apply for such a declaration should be made in a manner that is not arbitrary, discriminatory, or in bad faith. This is analogous to a union deciding whether or not to file a grievance or to advance a grievance to arbitration. The difference is that a grievance is filed on behalf of an individual worker or a group of workers. An application for successorship is made on behalf of the entire bargaining unit.
33. In fact, in some circumstances, applying for a declaration of common employer or sale of business may be the only effective action under the Act that a union can take to protect its collective bargaining rights and collective agreement for a bargaining unit. A declaration of common employer or sale of business can protect

the employment rights of existing workers who are in jeopardy of losing their jobs, as well as any other rights under their collective agreement.

34. If unions have a duty of fair representation in representing workers in defending their collective agreement rights through a grievance procedure, they should have the same duty in representing workers to defend the continuation of the collective agreement as a whole.
35. In the case of the PWTransit unit, a declaration of sale of business or common employer would have had the result of providing much better employment security to the members of the PWTransit unit. They would have had rights to continue doing their jobs without applying to be hired by DRT.
36. The Applicants argue that Unifor and its Local 222 had an obligation to consider all possible avenues to protect them from the potential consequences of the end of the PWTransit contract to provide Whitby transit services for DRT. This includes giving fair consideration to making an application to the OLRB for a declaration of common employer, or declaring a sale of business. We argue that the manner in which Local 222 arrived at the decision to not follow this course of action was clearly arbitrary and in bad faith.
37. Application to the OLRB for a declaration of common employer or sale of business is detailed in the Ontario Labour Relations Act. The Act provides that such applications can be made by Unions as part of their role in defending their members. As such, we argue that making decisions about such applications can be considered as part of a Union’s duty of fair representation under section 74 of the Act.
38. Losing one’s job can be considered the capital punishment of labour relations. Nothing can be more important to a worker than the right to continue their employment so that they may earn a living for themselves and their families. As such, when workers who are members of a union are faced with the prospect of losing their job, the union must respond to the situation with the utmost seriousness. This applies in the individual case of a worker whose employment has been terminated, which is why many grievances and arbitration cases deal with firings. Likewise, case law supports that unions must not fail to defend members who have

lost their jobs without ensuring they have carried out a full investigation, considered the evidence and views of the member involved, and given full consideration to the circumstances before deciding, for example, to not submit a grievance, or decide to not take a grievance to arbitration. These are common subjects for section 74 complaints.

39. We argue that when members of an entire bargaining unit are in jeopardy of losing their jobs, the situation is more serious than when it is just one worker. As such, if a decision to not make an application for common employer or sale of business is arrived at in a way that is arbitrary or done in bad faith, it should be considered a violation of the duty of fair representation.
40. In *Halton Elementary Unit of the Ontario English Catholic Teachers Association (O.E.C.T.A) v. Ontario English Catholic Teachers Association*, 2013 CanLII 9950 the Board found that "The duty of fair representation is 'co-extensive' with the exclusive bargaining agency status of the union or 'commensurate with the reach of the union's statutory authority to represent the employees in the bargaining unit." (Paragraph 26).
41. Filing an application for a declaration of a sale of business or common employer is part of a union's statutory authority under the Act.
42. Further, in Sarnia Construction Association [2004] OLRB Rep. March/April 407 paragraph 66 the Board notes that Section 74:

> *covers many things – the negotiation of a collective agreement, the day-to-day administration of a collective agreement, including the processing of grievances ... but does not extend into other activities of the union such as voluntary assistance given to members in their dealings with public agencies (e.g., WSIB, EI, Immigration,), matters of internal organization that are not related to the relationship with the employer (elections for office, the conduct of union meetings, and so on).*

43. We argue that the statutory authority of a union under the Act to apply for a declaration of common employer and/or sale of business is a representational activity that is subject to the duty of fair representation because it is acting to maintain the rights that workers have to their jobs through a collective agreement.

44. The obligation under Section 74 applies to the manner in which a union makes a decision to make such an application or not.
45. It is uncontested that Local 222 decided to sign an undertaking to not make application for a declaration of common employer or sale of business without any consultation with the members or unit representatives of the PWTransit bargaining unit. Local 222 never notified any members of the PWTransit bargaining unit that they were considering signing such an undertaking. Failing to have any discussion with the workers most affected by their decision makes the Union's decision arbitrary.
46. OLRB Information Bulletin 12 gives an example of conduct that could be found to be arbitrary:

> *A union acts arbitrarily when handling a grievance if its conduct is superficial, capricious, indifferent, or in reckless disregard of an employee's interests. For example, if a union met with the employer and received a different version of the grievance than the grievor's and then dropped the grievance, without having given the grievor an opportunity to answer the employer's version, it might be found to have acted arbitrarily.*

47. The Application and the Response provide evidence that the workers directly affected by the Union's decision to sign an undertaking not to make application for a declaration of common employer and/or sale of business were not consulted in any way about that decision, and were not even informed it was being considered. The Union's response states that they accepted the arguments from DRT management regarding common employer/sale of business, yet they never informed the PWTransit workers of these arguments, or even that they had been put forward (Response paragraphs 41, 42). By accepting DRT management's point of view without discussing it with the workers they had a duty to represent, Local 222 was acting in an arbitrary manner that jeopardized the rights of the PWTransit workers.
48. Considering the other aspects of how this situation was handled by Local 222 – secretiveness, dishonesty, failure to treat PWTransit workers and unit reps with fairness and respect, as laid out in the Application - the decision to undertake to not

file for a declaration of sale of business or common employer was arguably in bad faith.

Common Employer

49. It has been found that where “there exists a sufficient degree of relationship” between different legal entities, “there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees.” (Downtown Eatery (1993) Ltd. v. Ontario paragraph 30) This judgement continues “What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship … The essence of that relationship will be the element of common control.”
50. Many elements of “common control” over the work of the PWTransit workers by DRT and PWTransit are detailed in the Application, including in paragraph 16. Thus, there are grounds to believe an application for common employer may have been successful, and should have been carefully considered by Local 222, and discussed with the workers and Unit representatives of the PWTransit Bargaining Unit.

Sale of Business

51. The Respondent refers to CAW v Charterways and Town of Ajax ([1994] OLRB Rep. October 1296). In that decision the Board cited the principles behind recognizing successor rights in the case of the sale of a business from a previous case, Metropolitan Parking Inc. [1979] OLRB Rep. Dec. 1193:

> *Section 55 [now 64] avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining status quo by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded in the statute) into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business.”*

52. In determining when these “vested interests” need to be recognized, the Board referred to Culverhouse Foods Ltd. [1976] OLRB Rep. Nov. 691:

> *The cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trade mark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business … No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life on its own; none will necessarily determine the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e., whether there has been a continuation of the business.*

53. The Applicants submit that there was a reasonable prospect of winning a declaration of sale of business in this case since "the nature of the business after the transfer" would be substantially the same as before – the provision of transit services in Whitby.
54. It is a complicating factor that Local 222 represented the DRT Bargaining Unit as well as the PWTransit Bargaining Unit. However, we argue that Local 222's duty of fair representation to the members of the PWTransit Bargaining Unit would have been the same whether the DRT Unit had been represented by a different union, or not at all, or (as is the case) represented by Local 222. Our Application solely deals with Local 222's duty of fair representation to the PWTransit workers.

Submissions Regarding Delay

55. The Union's response argues in paragraph 58 that "To the extent that the Application complains of conduct of Local 222's bargaining with DRT up to and including August 2022, the Application ought to be dismissed because of unreasonable delay." As noted above, the bargaining with Durham Region Transit up to completing the collective agreement in August 2022 is NOT the focus of the Applicants' complaint against Local 222.

56. In paragraph 59 of their response, the Union argues that “in the case of events that culminated in June 2023 when the Applicants had full knowledge of the May 2023 agreement, the Applicants delayed for five months in the filing of an application which is an unreasonable delay.

57. The Union’s statement is incorrect on an important point. None of the Applicants had “full knowledge” of the May 2023 Memorandum of Agreement until it was disclosed to Applicant Tim Thompson on August 8, 2023, as is documented in the Application, Schedule B paragraph 84.

58. It took considerable time to collect and collate all the emails, letters and other material to document the sequence of events and establish the Applicants’ case against Local 222.

59. The collection of material and preparation of the Application was more difficult and time consuming because of the number of Applicants.

60. For all these reasons we argue that the period from August 8, 2023 to November 2, 2023, a period of less than 3 months, is not an unreasonable delay.

Summary

61. The Applicants submit that they did not unreasonably delay submission of their complaint, and the Application should not be dismissed on those grounds.
62. The Applicants submit that they have established a prima facie case that Unifor Local 222 breached their duty of fair representation in bargaining an agreement (the MOA) with DRT and PWTransit at a time when they represented the PWTransit Bargaining Unit.
63. The Applicants further submit that they have established a prima facie case that Unifor Local 222 breached its duty of fair representation to the Applicants in their decision to undertake not to make application for a declaration of sale of business or common employer, and how they went about making that decision, when there are grounds to believe such application may have been successful and would have better protected the rights of the Applicants.

Respectfully submitted