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Ontario Labour Relations Board HIGHLIGHTS

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Pending Court Proceedings

Beginning this month, each issue of *Highlights* will include a list of Pending Court Proceedings relating to applications for judicial review of Board decisions. The list will appear after the Scope Notes. As in the past, *Highlights* will summarize and report on Court decisions and endorsements as they become available.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of last year. Some of these decisions will appear in the November/December issue of the OLRB Reports:

Bargaining Rights – Construction Industry – Employer – Termination – The Board considered whether the Employer met the definition of "non construction employer", and was thus entitled to a declaration terminating the bargaining rights of the Union and ending the provisions of the collective agreement to which the Employer was bound – The Board found it important to distinguish between primary and incidental activities in determining whether the definition applied and examined factors including the degree of control exercised by the employer on the activities undertaken, the fact that the Employer's primary business was leasing retail and office space and, most significantly, that the Employer earned its revenues from the products of construction – A decision to contract out construction activity is not determinative that an Employer does not operate a business in the construction industry – Notwithstanding that the Employer had ceded control over the actual construction to outside professionals, the Employer's engagement in the construction industry was not incidental – The Board held that the Employer was not a "non-construction employer" – Application dismissed

CADILLAC FAIRVIEW CORPORATION LIMITED, THE; RE CJA AND ITS LOCALS AND AFFILIATES; File No. 0730-99-R; Dated: December 18, 2002; Panel: Mary Ellen Cummings (10 pages)

Construction Industry – Related Employer – Sale of Business – The core issue considered by the Board was whether a twelve-year hiatus between the two responding companies carrying on businesses which performed the same or similar work under the common direction and control of one person should cause the Board to refuse to grant relief – The Board interpreted for the first time, amendments to the Act at section 126(3) directing the Board to consider, among other matters, "the length of any hiatus….", considered the *Interpretation Act* and reviewed its jurisprudence on its treatment of a hiatus period in the context of related employer applications (*Brant Erecting*, *Roy Brandon Construction*, *Ian Somerville*, *Kent Acoustics Limited*, and *K.N.K. Limited*) – The Board found that section 126(3)2.i did not require it to take a different approach from its earlier rationale: Mr. Palmer operated a business for four years under a collective agreement with a province-wide scope; twelve years later he carried on a business which performed the same work and which relied for its success on the same core business assets (his entrepreneurial skills); the fact that he operated under a different corporate name was precisely the kind of change that subsection 1(4) was designed to overcome – The Board declared the two responding parties to be one employer, but held, given the extremely long hiatus period and the fact that the employer was a small trade subcontractor, that AML would only be bound by

the collective agreement after the date of the Board's decision – Declaration granted

CROSSROAD INTERIORS ONTARIO LTD., AND AML INTERIORS INC.; RE CJA, LOCAL 259; File No. 0538-02-R; Dated December 5, 2002; Panel: David A. McKee (13 pages)

***Employment Standards Act* – Strike –** The Board reviewed an ESO's refusal to issue an order requiring the employer to pay holiday pay to each of the claimants in respect of a public holiday – The claimants' Union had advised the employer that a legal strike would begin two days after the public holiday – The employer directed the employees not to report for work on the day following the public holiday – To successfully claim holiday pay, the claimants must be found to have worked on both their last scheduled regular day of work preceding the public holiday (which they did), and their first scheduled regular day of work following the public holiday **–** The issue before the Board was whether the claimants' scheduled regular day of work following the public holiday was the day the strike began or the day of recall after it ended – The Board noted that an employer retains the right, during a strike, to continue its operations and schedule employees – The Board held that on a plain reading of the Act, a day on which an employee is participating in a lawful strike can be a scheduled regular day of work – The Board also noted that the alternative interpretation leads to a result where employees during a long strike could be entitled to holiday pay for a number of days, and that such a result would be unreasonable – Since the claimants failed to work their scheduled regular day of work following a public holiday they were not entitled to holiday pay – Application dismissed

DISTINCTIVE DESIGNS FURNITURE INC. AND MINISTRY OF LABOUR; RE HAIMANOT ADEBE ET AL; File No. 3704-01-ES; Dated December 9, 2002; Panel: Mary Anne McKellar (6 pages)

Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – Between the hearing of one day's evidence from both parties (where significant issues of credibility existed) and the next scheduled hearing date, the Vice-Chair resigned from the Board – The matter was reassigned to another Vice-Chair for a hearing *de novo* and the employer objected, requesting that the Board, pursuant to s. 111(2)(j), inquire into what the previous Vice-Chair had heard, using that information as the factual basis for proceeding – The Board found that although the earlier evidence would be less likely to be tainted by the passage of time or the desire to fit the facts to the interests at stake, this did not outweigh the undesirability of the ultimate trier of fact having to rely on findings and observations made by someone else, especially where credibility was critical to the matter in dispute – Furthermore the evidence could be reheard in one day and finally there would be no intrusion into deliberative privilege – Matter referred to Registrar for hearing *de novo*

EMBEE PROPERTIES LIMITED; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA; File Nos. 1564-02-R; 1578-01-U; Dated December 2, 2002; Panel: Kevin Whitaker (4 pages)

Duty of Fair Representation – Natural Justice – Reconsideration – Unfair Labour Practice – The applicant requested that the Board reconsider its earlier decision dismissing the application for failure to attend at the consultation – The Board had dismissed the application, after waiting its customary one-half hour, when the applicant failed to show – The applicant had arrived after 10 a.m., encountering the respondent and intervenor on their way down in the elevator – The applicant and his lawyer were in the coffee shop on the main floor of the building mistakenly thinking, notwithstanding having received the Notice of Hearing, that the hearing began at 10:00 rather than 9:30 – The Board noted that its jurisprudence showed that inadvertence or mistake were insufficient grounds for reconsideration for failure to attend – However the Board's approach in a recent case appeared to relax the test somewhat and the Board consequently decided that in the unusual circumstances of this case it would reconsider its decision to dismiss – The parties were ordered to provide written submissions with respect to the respondent's and intervenor's motions to dismiss for delay and for no *prima facie* case – Reconsideration granted

GENERAL MOTORS OF CANADA LIMITED; RE ALAN I. HOYNE; RE CAW-CANADA LOCAL 222; File No. 3603-01-U; Dated December 23, 2002; Panel: Mary Anne McKellar (8 pages)

***Employment Standards Act* – Related Employer – Termination –** The Board reviewed an Order to Pay against two related employers, in relation to unpaid wages, vacation pay and

termination pay found owing to six former employees – In examining the requirements for employers to be found "associated or related" the Board considered the common management between the employers, the degree of common financial control despite being separate legal entities at the time of the claimants' terminations, the fact that both companies continued to use the same premises and other assets, the continued use of a common trade name, and the apparently fluid movement of employees between the two companies – The Board held that the lack of common ownership between the employer corporations is insufficient to rebut the finding that they are related employers – Close functional interdependence between the activities or businesses of both companies resulted in the Board finding that both businesses were carried on for the benefit of related principals, thereby defeating the intent and purpose of the Act – The Board held that both employers should be treated as one under the ESA – Application allowed in part

GROUPMARK CANADA LTD.; RE MARGARET GAYE CAMPBELL, ET AL, AND MINISTRY OF LABOUR; File No. 0329-00-ES; Dated December 13, 2002; Panel: Caroline Rowan (16 pages)

Employment Standards Act – On an application for review of an Order to Pay the Board considered the employer's deduction from wages, without written authorization, of three hours pay from each pay check – The Board found that the Act and Regulations were clear – An employer cannot deduct monies from an employee's wages without written authorization to do so – Application dismissed

KINGCHURCH AUTOMOBILE INC.; RE JASON RIDER AND MINISTRY OF LABOUR; File No. 2965-01-ES; Dated December 9, 2002; Panel: Brian McLean (4 pages)

Bargaining Rights – Conciliation – Construction Industry – Reference – The Board was asked to consider whether the Minister had authority to appoint a conciliation officer where the Employer objected to the appointment on the grounds that the Union had abandoned its bargaining rights **–** A meeting between the Union and the Employer where the Union intended to have the Employer sign a collective agreement is a bargaining meeting within the meaning of the *LRA* **–** The Board held that the Minister does have the authority to appoint a conciliation officer since the Union and the Employer had met and bargained, and at the time the Union requested the appointment of a conciliation officer, the Union had not abandoned its bargaining rights **–** An abandonment of bargaining rights is a question of fact and is a matter of the union's intention, as gleaned from the objective circumstances

MAGINE INC.; RE TEAMSTERS LOCAL UNION 230, READY MIX, BUILDING SUPPLY, HYDRO AND CONSTRUCTION DRIVERS, WARE-HOUSEMEN AND HELPERS, THE UNION; File No. 2530-01-M; Dated December 18, 2002; Panel: Harry Freedman, G. Pickell, A. Haward (4 pages)

Construction Industry Grievance – Intervenor – Practice and Procedure – The Board considered whether to grant intervenor status to various parties to assist in interpreting the meaning of contracting out provisions of a Letter of Undertaking – The Board drew a distinction between parties with a "direct legal interest" and "commercial or incidental interest" – Where there is a possibility of conflicting decisions issuing from the Board on the same fundamental issue, intervenor status will be granted to parties with a legal interest in the determination – The Board considered the expertise of the parties and possible prejudice caused to others as a result of granting intervenor status – The Board granted intervenor status to parties for the strict purpose of deciding whether either is bound to any of the collective agreements in dispute, but not for determining the meaning of the collective agreement – The fact that a party faces a similar issue in an unrelated litigation does not give rise to a legal interest in the matter being decided in the current case

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO, AND IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO; File No. 0979-02-G; Dated December 16, 2002; Panel: David A. McKee, G. Pickell, G. McMenemy (5 pages)

***Bankruptcy and Insolvency Act* – Construction Industry Grievance – Related Employer – Sale of Business – Stay –** The day before the Union's single employer/sale of business applications and additional grievances were to be heard the respondent made an assignment in bankruptcy and a Notice of Stay of Proceedings was issued

by the trustee in bankruptcy – The Board directed notice be given to the trustee and the matter was reconvened with the trustee as intervenor – The Board considered the application of s. 69.3 of the *BIA* to the proceedings and found that the nature of the matter before the Board was a "proceeding for the recovery of a claim provable in bankruptcy"; thus it was obliged to stay the proceedings – The Board further noted that staying the proceedings did not prevent the applicant from continuing its action, rather it invited the union to apply to court and seek permission to continue before the Board – Matter stayed

PAGE FLOORING ENTERPRISES INC.; RE CARPENTERS & ALLIED WORKERS, LOCAL 27, CJA; SCHWARTZ LEVITSKY FELDMAN INC., TRUSTEE IN BANKRUPTCY; File Nos. 0453-00-G; 0813-00-R; 1785-02-G; 1786-02-G; Dated December 11, 2002; Panel: Mary Ellen Cummings (5 pages)

Accreditation – Bargaining Rights – Collective Agreement – Construction Industry Grievance – The Union alleged that the Employer was bound by the province-wide scope clause of the agreement between the union and ISCA, an accredited employer association since 1984 – In 2001 the union was certified as the bargaining agent of employees of the Employer to represent carpenters and carpenters' apprentices in the ICI sector in the Province of Ontario and for all sectors other than ICI in Board Area 9 – The Board, in determining the geographic scope of the ISCA agreement as it applied to Platinum, interpreted the accreditation provisions of the Act and found that because ISCA had acquired only the rights, duties and obligations of Platinum, which rights, duties and obligations did not extend beyond Board Area 9 in the residential sector, that Platinum was only bound to the collective agreement in Board Area 9 – The Board noted further that while the purpose of accreditation was to create a common bargaining pattern, the accreditation sections of the Act did not extend the union's bargaining rights – Whereas the history of province-wide bargaining in the ICI sector resulted in specific amendments in 1978 mandating province-wide bargaining, this is not the case within the accreditation provisions – Grievance dismissed

PLATINUM DRYWALL LIMITED; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, CJA; RE INTERIOR SYSTEMS CONTRACTORS ASSOCIATION OF ONTARIO; File No. 1801-02-G; Dated December 5, 2002; Panel: David A. McKee, G. Pickell, G. McMenemy (11 pages)

Certification – Construction Industry – Timeliness – Unfair labour practice – The Labourers brought a certification application within one year of a dismissed Carpenters' application – Seventeen of the names on the voters' list for the Labourers' application were the same as on the Carpenters – The Board considered the bar in s. 10(3), assumed without deciding that it applied, and decided to exercise its discretion pursuant to 10(3.1) to relieve against the bar for the following reasons: 1) the applicant Labourers were applying for a completely different bargaining unit from the Carpenters; 2) the province wide bargaining provisions in the Act make the Labourers and Carpenters bargaining units mutually exclusive; 3) the construction industry is organized primarily along craft lines and the Board does not issue "all employee" units in the construction industry; and 4) generally the movement of one or more individuals among craft groups does not conflict with or undermine the overall policy of permitting collective bargaining self-determination by each craft group – No bar to the application

SMID CONSTRUCTION LTD.; RE LIUNA, LOCAL 506; File Nos. 1387-02-R; 1310-02-U; Dated December 11, 2002; Panel: David A. McKee (10 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – Timeliness – The Board had determined in an earlier decision that if the Applicant's material in this certification application had arrived beyond the two day limit in the Board's Rules the application must be dismissed – The Board was asked to reconsider its decision and found it appropriate to do so, given that the question of whether the Board has discretion to extend the time under its rules for service raised important matters of Board policy and procedure – On reconsideration the Board found its original decision to be incorrect when it precluded the applicant from requesting that the Board exercise its discretion to extend time for delivery of the application for certification – The Act requires that service be in accordance with the Board's Rules, but Rules 44 and 49 allow the Board to relieve their strict application and to shorten or lengthen time periods – Reconsideration granted, matter scheduled for hearing

THORIUM CONTRACTING LTD.; RE CARPENTERS AND ALLIED WORKERS LOCAL

27, CJA; File No. 1553-02-R; Dated December 16, 2002; Panel: Harry Freedman (3 pages)

Bargaining Rights – Construction Industry Grievance – Unfair Labour Practice – The applicant union asserted that the respondent "Corporation" was bound to the collective agreement between the applicant and the respondent "Construction Inc." as a result of Minutes of Settlements from 1995 – The two respondents were "related employers" for purposes of the Act – The original 1995 settlement agreed that "Construction Inc." and "Sons Limited" were a single employer for the purposes of the Act – The Board found that, as a result of section 160.1 and section 2.2 of Regulation 105/01, when the applicant's bargaining rights were statutorily deemed abandoned in respect to Sons Limited, they were also abandoned in relation to Construction Inc., as they were a single employer within the meaning of the Act; accordingly there were no bargaining rights that would apply to Corporation – Grievance dismissed

TOM JONES CONSTRUCTION INC. AND TOM JONES CORPORATION; RE PAT, ONTARIO PROVINCIAL COUNCIL AND PAT, LOCAL 1671; File Nos. 0897-02-G; 0898-02-G; 2667-02-U; 2670-02-G; Dated December 16, 2002; Panel: Harry Freedman, John Tomlinson, Alan Haward (5 pages)

Construction Industry – Interference in Trade Union – Practice and Procedure – Unfair Labour Practice – The Carpenters, Local 1256, applied for declaratory and other relief alleging that the International had altered the Local's jurisdiction and was interfering in their autonomy without just cause, in violation of sections 147 and 149 of the Act – The International moved to have the Board exercise its discretion to dismiss the application on the ground that there would be no labour relations purpose to proceed, given that the Board in a previous decision had already determined that the International had just cause to implement a regional council structure, to abolish district councils and to require locals to become part of a larger regional council – The International acknowledged that the applicant had pleaded a *prima facie* case – The Board dismissed the International's motion since the determination required an assessment of whether the parent union's decision was a fair and reasonable one having regard to all of the circumstances including an assessment of the "ability of the local trade union to carry out its duties" under the Act – Furthermore the Local had been denied intervenor status in a procedural ruling from the previous decision relied upon by the International, depriving the Local of an opportunity to challenge the actions taken by the International – Motion dismissed

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL UNION 1256; File No. 3639-01-U; Dated December 2, 2002; Panel: Harry Freedman (6 pages)

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Elizabeth Balanyk v. The Greater Niagara General Hospital et al SCC No. 29423	0074-99-U	Balanyk seeking leave to appeal to SCC
Ont. Council Int'l Painters & Allied Trades v Blastco Corporation Divisional Court No.711/02	1416-02-G	Pending
UBCJA & its locals & affiliates v. Cadillac Fairview Corporation Divisional Court No. 622/01	0730-99-R	Adjourned
Canadian Health Care Workers v. CAW-Canada, Central Park Lodges et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Pending
CUPE Local 5167 v. City of Hamilton et al Court of Appeal M29220	0587-00-R; 1891-00-U	OPSEU seeking leave to appeal
OPSEU v. City of Owen Sound et al Court of Appeal No. M29050	1192-00-R	City seeking leave to appeal
CAW-Canada & its Local 385 v. Coca-Cola et al Divisional Court No. 751/02	0179-01-R; et al	Pending
ATU Local 107 & 1585 v. Corporation City of Hamilton et al Divisional Court No. 448/02	3816-00-PS; 0089-01-PS	Pending
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Pending
UBCJA v. Great Atlantic and Pacific Co. of Canada Divisional Court No. 686/01	0098-99-R; 0484-01-R	Adjourned
Ont Prov Conference Int'l Union of Bricklayers v. Int'l Bricklayers and Craftworkers, et al Divisional Court No. 352/01	1904-99-U; 2352-98-U; et al	Pending
IBEW Local 586 v. K2 Contracting et al Divisional Court Nos 01-DV-666; 01-DV-667	0007-96-R; et al	Pending
Northwest Agro-Forestry Services v. CEP et al Divisional Court No. 277/00	0835-99-R	Pending
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. Ottawa Transition Board, et al Divisional Court No. 02-DV-723	2353-00-PS	Pending
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending

Case name & Court File No.	Board File No.	Status
PCL Constructors Eastern, et al v. Ont. Pipe Trades et al Divisional Court No. 347/01	3771-95-R	Pending
IBEW Local 353 v. Quadracon Divisional Court No. 811/00	2560-99-R	Adjourned
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Pending
Dervent Thompson v. OLRB Divisional Court No. 314/02	870-01-U	Pending
The Shopping Channel v. USWA Divisional Court No. 299/00	1123-99-U; et al	Pending
Rachelle Martin v. AMDAHL Canada Ltd. Divisional Court No. 47/2001	0167-97-OH	Pending
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Heard Dec. 12/02; reserved
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3250-99-ES	Pending
663605 Ontario Ltd. o/a Guardian Eagle Resort Divisional Court No. 567/00	3742-97-ES	Pending
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Pending
Gwen Staub Employment Standards Officer v. Tenneco Canada, et al Divisional Court No. 80/2002	0935-01-ES	Tenneco seeking leave to appeal

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Some of 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 Library, now located on the 7th Floor, 505 University Avenue, Toronto.