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Ontario Labour Relations Board HIGHLIGHTS

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New OLRB Website

Welcome to the OLRB OnLine*:* The Board is proud to introduce our brand new website. The site has been redesigned to be comprehensive and, we believe, more user friendly. We have formatted the site with a new look and feel; a logical layout and flow with access to a number of new features and links including: *Recent Decisions of Interest* and access to all OLRB decisions through a new link with CANLII. As well, we have provided access to the OLRB's *Daily Hearing Schedule*, a spot for regular *Notices to the Community*, improved access to our forms, rules and information bulletins and much, much more.

The new website address is www.olrb.gov.on.ca

New Vice-Chairs

The Board is pleased to announce the following appointments:

Bruce Binning was called to the Bar of Ontario in 1960. He joined Mathews Dinsdale and Clark in 1962 and remained in practice there until his recent retirement. Mr. Binning is one of the leading construction labour relations counsel in Canada. He joins the Board as a part-time Vice-Chair.

Norman Jesin was called to the Bar of Ontario in 1983. He was an articling student at the Board, then worked with Caley Wray. In 1988 he became a founding partner of Jesin Watson and McCreary where he practised until earlier this year. Mr. Jesin has opened an arbitration and mediation practice and will be a part-time Vice-Chair at the Board.

Christopher Albertyn

Chris Albertyn, originally appointed to the Board in 1994, becomes a part-time Vice-Chair effective September 1, 2004. Mr. Albertyn will be available for private arbitration and mediation.

New Hearing Monitor – The Board has had a new hearing monitor installed **in the lobby** (located adjacent to the elevators) of 505 University Avenue.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in August of this year. Some of these decisions will appear in the July/August issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Practice and Procedure – Representation Vote – Termination – The applicant's Form A-80 (Declaration Verifying Evidence of Employee Wishes) was filed one day late and by facsimile, in violation of the Board's Rules – The Board noted the historical importance of this Form, and equivalent ones under the industrial scheme, and that they are now less important given the Board's mandate to assess the "appearance" of employee wishes – The Board further noted that the application itself, without Form A-80, provided the same information (number of employees and number of persons in the bargaining unit) that was required on Form A-80 – Given that the Board was able to satisfy itself that the minimum requirements of the Act had been met, the Board

relieved against the strict application of the Rules and found that the applicant was entitled to a representation vote – Confirmation of decision to order vote – Hearing continues

BRICKLAND MASONRY CONTRACTING (1996) INC.; RE MR. BELMIRO CRUZ; RE MASONRY CONTRACTOR'S ASSOCIATION OF TORONTO; BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL1; UNIVERSAL WORKERS UNION, LIUNA LOCAL 183, MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY; File No. 0414-04-R; Dated August 17, 2004; Panel: David A. McKee (4 pages)

Discharge – Employment Standards – Reprisal – The employee applicant was seeking reinstatement and monetary damages for the employer's alleged failure to reinstate her following her pregnancy and parental leave – The employer was in the process of winding down his legal practice, so a decreasing amount of work was available for the support staff – The employer informed the applicant that upon her return to work, she would receive notice of termination because the employer was retaining the other support staff employee (who had also just returned from maternity and parental leave) – The employer then had a series of computer problems that made the applicant's work unavailable, delaying the date of her return to work – The applicant refused to communicate with the employer during her pregnancy leave, parental leave, and what was deemed to be a temporary layoff – The applicant did not return to work when she was eventually asked to do so – The Board found that there was no evidence that the employer terminated her employment for any reason related to her leave – Further, the Board found that by failing to return to work and to communicate with her employer about a return to work, she abandoned the employment relationship, and forfeited any entitlement to termination pay – Appeal dismissed

DAVID & DAVID AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JOSIE BENIC; File No. 1266-03-ES; Dated August 16, 2004; Panel: Tanja Wacyk (10 pages)

Construction Industry Grievance – Collective Agreement – Trustees – This dispute arose under the terms of the Canadian Elevator Industry Pension Trust Fund – The applicants (three Trustees appointed by the International Union) and the respondents (three Trustees appointed by NEEA) agreed for the purposes of the grievance referral that the provisions of the Declaration of Trust that created the fund were incorporated into the Ontario Provincial Collective Agreement – The parties could not agree on which company should be appointed as the Fund actuary – The Board noted that the duty of a third party adjudicator in making a decision on behalf of a deadlocked Board of Trustees is to make a decision most closely in keeping with the terms and objects of the trust having regard to the nature of the decision to be made – Its decision should be based on what it thought the *Board of Trustees* ought to have decided, considering its fiduciary role – The Board found that the criteria used by the Board of Trustees, upon the advice of a lawyer, were appropriate – The Board then considered the merits of the three companies' proposals, using such criteria as cost, insurance coverage, and breadth of service, to ultimately award the contract – Order accordingly

DAVID McCOLL, ANDREW REISTETTER AND RAY STINSON; RE TOM McCANN, RICK BAXTER, AND GLEN JONES; File No. 1125-04-G; Dated August 12, 2004; Panel: David A. McKee (4 pages)

Certification – Construction Industry – The Board had to determine whether work performed on a cylindrical tank made of coated steel, with a capacity of 120,000 barrels of oil, was work falling with the definition of the construction industry or whether it was maintenance work – The Board found much of the work to be maintenance, yet the work also involved major structural changes including the building of extensive concrete foundations, which, along with other work, was construction – The Board noted it was not engaged in a philosophical examination of the essential nature of a particular piece of work divorced from the real world of the labour relations context in which it occurs and that it must give the definition a purposeful application – Given that Matrix was able to identify the nature of the bulk of the work on the project as construction, there was no labour relations purpose in subdividing that work, function by function, when the same crew of employees will perform all the work – The Board concluded the employees were performing work in the construction industry

MATRIX SERVICE INC.; RE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS FORGERS AND HELPERS, LOCAL 128; File Nos. 4239-03-

R; 4240-03-R; Dated August 31, 2004; Panel: David A. McKee (11 pages)

Constitutional Law – Employment Standards – Intervenor – The applicant challenged the ESO's jurisdiction to make an Order to Pay on the grounds that the employer's employment relations are subject to federal jurisdiction – A notice of constitutional question was filed and the Attorney General of Ontario intervened – The Board applied the Supreme Court's "functional test of the nature of their operations and their normal activities" in *Four B Manufacturing Ltd. v. United Garment Workers of America*, to characterize the employer's undertaking, in order to determine whether the exception to the rule of exclusive provincial legislative competence applied – The Board examined the nature of the employer's operations in which the employment relationship existed to assess whether it is an integral element of a subject coming under a federal head of power – The Board found that the applicant was engaged in the rehabilitation of individuals who are trying to overcome alcohol and drug addiction and that that function, notwithstanding being carried out on a First Nation reserve, employing only members of the First Nations and using traditional aboriginal healing techniques, was a matter of provincial jurisdiction – Furthermore, there was nothing in the nature of the applicant's operation as a rehabilitation centre that related to the core of "Indianness" as protected by s. 91(24) of the *Constitution Act, 1867* and set out in *Delgamuuk v. British Columbia* – Preliminary objection dismissed – Matter proceeds to hearing on the merits of appeal

MIGISI ALCOHOL & DRUG TREATMENT CENTRE; RE MEL HARDY AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ATTORNEY GENERAL OF ONTARIO; File No. 0808-03-ES; Dated August 18, 2004; Panel: Harry Freedman (10 pages)

Related Employer – Sale of Business – Termination – The Union held bargaining rights with Nazarene until terminated by the Board pursuant to section 63 – The related employer/sale of business application was filed before the termination application, but was not heard until after the termination application due to production issues – The employers moved to dismiss the 69/1(4) after the termination declaration arguing there was no useful purpose in continuing with it as the bargaining rights the union was trying to protect were terminated – The Board found that a live issue remained between the parties, since if Guide did become bound by the collective agreement by which Nazarene was bound, then the applicant ought to be able to take the necessary steps to protect its bargaining rights by enforcing the collective agreement up to the point of the declaration terminating those rights – Motion dismissed

NAZARENE FINE INSTALLATION INC. AND GUIDE WOODWORKING INC.; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UBCJA; File No. 4026-02-R; Dated August 23, 2004; Panel: Harry Freedman (4 pages)

Bargaining Unit – Sale of Business – CLAC represented the employees of a retirement home acquired by Niagara – CUPE, with bargaining rights for a single unit comprising the Regional Municipality of Niagara's seven homes for the aged, brought a sale of business application contending that there had been sufficient intermingling, and that CLAC employees should be subsumed into the CUPE unit – The Board found, following *Caressant Care* and *Metropolitan Toronto*, that despite limited evidence of employee intermingling, there was an operational integration of the newly acquired retirement home: there was some integration in terms of structure, policy and managerial reporting – The Board found that there had been a sale of business, and that sufficient intermingling had occurred – CLAC members comprised only 7.5% of all service workers, so no representation vote was ordered – The Board found that CUPE represented the service employees in all eight homes and declared the employer no longer bound by the CLAC agreement

REGIONAL MUNICIPALITY OF NIAGARA, THE; AND NIAGARA HEALTHCARE & SERVICE WORKERS UNION LOCAL 302, AFFILIATED WITH CLAC; RE CUPE, LOCAL 1263; File No. 1279-03-R; Dated August 11, 2004; Panel: Patrick Kelly (12 pages)

Discharge – Interim Relief – Health and Safety – Reprisal – The applicant employee alleged that he was fired for making health and safety complaints, and sought interim reinstatement and a posting – The Board's jurisdiction to order substantive interim relief was challenged by the employer – The Board found that section 16.1 of the SPPA applies and, in contrast to section 98 of the LRA, which is not incorporated by section 50 of the OHSA, allows for substantive interim

decisions – The employee proposed a two part test to determine if an interim application would be granted: first whether the applicant has pleaded an arguable case in the main application, and second, the balance of harm – The employer submitted that the first part of the test should be a strong *prima facie* breach of the Act – The Board found that the employee's case was strong enough to pass whatever form the first part of the test took – In assessing the second part of the test, the Board considered the potential harm to the workplace generally, not just the applicant – The Board found the balance of harm favoured interim reinstatement: there was little potential harm to the employer presented to the Board, whereas, in the circumstances of this case, there was a risk that employees would be intimidated to raise health and safety concerns – Interim reinstatement and Order to Post Notice – Main application expedited

TRICIN ELECTRIC LTD.; RE RAY MARTIN; File No. 1465-04-M; Dated August 10, 2004; Panel: Brian McLean (23 pages)

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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.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Pending
Autoland Chrysler (1981) Ltd., Michael Leahey v. Teamsters Union, Local 879 Divisional Court No. 463/04	1151-03-R	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 – Divisional Court No. 368/03 Motion for Leave to Appeal No. M31292	3060-02-G	Dismissed March 11, 2004 Pending
Enka Contracting Ltd. v. UBCJA Divisional Court No. 448/04	0176-04-U; 0186-04-G; 0187-04-U	Pending
Joseph S. Rooke v. Stelco Hamilton, OLRB & Ministry of the Attorney General for Ontario Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	Pending
Dr. Nicholas Hawrylyshyn, et al, o/a **Square One Dental Ctre.** v. Queen in Right of MOL, et al Divisional Court No. 343/04	1721-02-ES	Pending
OPSEU v. PIPS, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Pending Motion to stay dismissed July 9/04
UBCJA, Local 494 v. **Build Force Construction Ltd.**, 1404406 Ontario Ltd., Unicor Construction Inc. (Stated Case) Divisional Court No. 368/04	1190-03-R; 1189-03-G	Pending
Alistair McEachran v. The Society of Energy Professionals and **Ontario Power Generation Inc.** Divisional Court No. 298/04	0179-03-U	Pending - Jan. 19/05
Sheet Metal Workers' Int'l Assoc. Local 30 v. **Crossby-Dewar Projects Inc**., Int'l Assoc. Heat & Frost Local 95 Divisional Court No. 144/04	1643-03-JD	Pending
Vincent Borg v. OPSEU, The Crown in Right of Ontario et al Divisional Court No. 83/04	1208-02-U	Pending
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Labourers' International Union of North America v. **Universal Workers Union**, et al Divisional Court Nos. 71/04 & 22/04	2320-03-M 2049-03-U	Pending – Feb. 7/05

Case name & Court File No.	Board File No.	Status
James Andrew Gerrie v. CAW Local 385; Coca-Cola Bottling Ltd. Divisional Court No. 2/04	2290-00-U	Pending – Nov. 16/04
Great Blue Heron v. Mississaugas of Scugog Island First Nation et al Divisional Court No. 7/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Mississaugas Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Elementary School Teachers' Federation v. OSSTF, Dist. 14 Kawartha Pine Ridge DSB et al Divisional Court No. 17/04	0797-01-JD	Pending – Nov. 8 & 9/04
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Pending
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV – HAMILTON	0185-03-U	Pending - Sept. 23/04
Cecilia Collier v. TTC Divisional Court No. 706/03	0632-02-U	Pending – Dec. 17/04
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 Divisional Court No. 679/03	1894-02-G	Pending – Oct. 7/04 Adjourned
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending – Feb.14/05
Greater Essex County District School Board Divisional Court No. 276/03	3398-00-R	Abandoned Aug.13/04
Windsor-Essex Catholic District School Board Divisional Court No. 277/03	3426-00-R	Abandoned Aug.13/04
William McNaught v. TTC, et al Divisional Court No. 254/02 Court of Appeal No. C41584	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; leave to appeal granted Mar. 26/04 Pending – Oct. 15/04