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Ontario Labour Relations Board HIGHLIGHTS

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Leonard Marvy

The Board is pleased to announce that effective July 1, 2005, Len Marvy has become a permanent member of the Solicitors' Office.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July of this year. 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.

Construction Industry – Discharge – Remedies – Representation Vote – Unfair Labour Practice – An employee was terminated prior to the certification vote, which the union subsequently lost – The Board was satisfied that there was sufficient membership support and that the discharge prevented the employees from exercising their true wishes – The Board ordered a second representation vote on a date requested by the union and allowed the union to hold a meeting with the employees during company time – The Board refused to accede to the union's request for other remedies – Second vote ordered

BATTANO CONSTRUCTION LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183; File Nos. 1157-04-R; 2205-04-U; Dated July 15, 2005; Panel: Christopher J. Albertyn (3 Pages)

Employee – Status – The union applied for a determination of employee status of rotational shift supervisors – The Board found that the position had been excluded since the first collective agreement entered into between the applicant and the predecessor employer (successorship was declared pursuant to the *Public Sector Labour Relations Transition Act, 1997*), and there have been no significant changes in the duties of the position – Consequently, no question has arisen that requires a s. 114(2) determination – Application dismissed

CENTRAL AMBULANCE COMMUNICATION CENTRE – WALLACEBURG; RE OPSEU; File No. 1959-04-M; Dated July 8, 2005; Panel: Timothy W. Sargeant (5 pages)

Employment Standards – The employer applied for review of an Order to Pay, arguing that the claimant was not an employee because he was an apprentice mechanic performing work under a college-approved program – The Board found that the individual was fulfilling his apprenticeship requirement with this employer and others and, although he was enrolled at Mohawk, the college had no involvement or interest in how his hours were logged – Further, a seven-week absence to attend classes full-time did not constitute a break in his employment – Application dismissed

COSIMO'S GARAGE LTD.; RE THEODORE SMITH AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3728-04-ES; Dated July 8, 2005; Panel: Mary Anne McKellar (7 pages)

Construction – Jurisdictional Dispute – The Board considered the assignment of a new technology in this jurisdictional dispute – The Carpenters submitted that the Roycet System was concrete forming construction and so should be assigned to its members – The Labourers submitted that the work was analogous to the

installation of pre-cast panels and so still belongs to their members – The Board held that the work was neither concrete forming nor the installation of pre-cast panels – Both unions' collective agreements could be reasonably interpreted to include the work and both unions' members had the requisite skill to complete the work – However, the nature of the work did not call for any carpentry skill and the employer's practice and preference supported the assignment of the work in dispute to the Labourers – Therefore the Board concluded that the assignment of the work to members of the Labourers was appropriate

DINEEN CONSTRUCTION CORP., RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UBCJA; LIUNA, LOCAL 506; RE ROYAL CONCRETE ENCASED TECHNOLOGIES INC.; RE ARG GROUP INC.; File No. 2460-04-JD; Dated July 14, 2005; Panel: Harry Freedman (7 pages)

Discharge – Unfair Labour Practice – The applicant complained that several day-shift employees were discharged during the course of its organizing campaign – The employer responded by asserting that the terminations were business-related and the direct result of outsourcing of a significant portion of the employer's activities – A majority of the Board found that, while the employer had *bona fide* reasons for a restructuring of its operations, the timing of the discharges and the identity of the targeted employees produced a taint of anti-union animus – The employer failed to persuade the majority that its motives were not tainted, thus it failed to satisfy the burden of proof in s. 96(5) – Declaration granted, notice posted and damages awarded

EXTRUFIX – A DIVISION OF CPI PLASTICS GROUP LTD.; RE USWA; File No. 2580-03-U; Dated July 7, 2005; Panel: Patrick Kelly, L. Wood, R. O'Connor (Dissenting) (25 pages)

Damages – Duty of Fair Representation – Unfair Labour Practice – In this duty of fair representation complaint, the union local no longer existed and no representative for the union appeared at the hearing – The union and the employer had earlier entered into minutes of settlement for a number of grievances – The Board had no reason to reject the applicant's claim and supporting evidence that the union representative did not care about the bargaining unit, did not have sufficient knowledge of what issues should have or did inform the settlement, and paid little or no attention to what amounts should be distributed to employees – The Board found that the union acted arbitrarily – However, since the applicant was unable to demonstrate the amount of damages he was entitled to, the Board was unable to order damages – Declaration granted

FORESTALL, JERRY; RE UFCW LOCAL 393W; RE COCA-COLA BOTTLING COMPANY; File No. 1171-03-U; Dated July 15, 2005; Panel: Marilyn Silverman (6 pages)

Employment Standards – In a series of applications for review by company directors, the Director of Employment Standards challenged the ability of the directors to advance a position that the employers for which they were allegedly directors were not related – Applications for review filed earlier by the employers were terminated when the employers failed to pay the quantum of the orders into trust – The Director of Employment Standards argued that the directors were bound by the employer orders and they could only dispute their status as directors during the relevant time – The Board found there was no express restriction precluding the directors from challenging the substantive basis of the orders – Matter continues

HAMILTON, ROBERT, A DIRECTOR OF 2000676 ONTARIO LIMITED; RE RAMINA AKTER ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 0588-04-ES; 0727-04-ES; 0729-04-ES; 0730-04-ES; 0731-04-ES; 0733-04-ES; 0735-04-ES; 0739-04-ES; 0740-04-ES; 0741-04-ES; Dated July 29, 2005; Panel: Marilyn Silverman (9 pages)

Certification – Construction Industry – In this card-based application for certification, the Board was not able to determine the percentage of employees who were members of the applicant on the date the application was filed, based only on the information required by the statute from the applicant and the responding party – The Board held that letters faxed to it after the filing date from persons in the bargaining unit are not relevant to the determination required under subsection 128.1(4) – Matter referred for Regional Certification Meeting

HOLMAN'S WELDING LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND

REINFORCING IRON WORKERS, LOCAL 700; File No. 0987-05-R; Dated July 6, 2005; Panel: David McKee, G. Pickell, A. Haward (3 pages)

Health and Safety – After the Ministry of Labour rescinded orders that were the subject of this appeal, the employer sought to have the Board conduct a hearing unless the Ministry agreed that the orders were void *ab initio* – The Board refused to deal with any of the employer's arguments – The Board held that the right of an aggrieved party to appeal pursuant to s. 61 of the Act was premised on the existence of orders, and could not be interpreted as mere supplication – In the absence of underlying orders, there was nothing to appeal – Appeal terminated

HUMBERLINE PACKAGING INC.; RE JOE ZAHER, INSPECTOR; File No. 3089-04-HS; Dated July 14, 2005; Panel: David A. McKee (2 pages)

Discharge – Employment Standards – Reprisal – The employer filed an application for review arguing that the employee is not entitled to termination or severance pay because she engaged in wilful misconduct and her termination was not a reprisal so the employee is not entitled to damages – When the employee began suffering from back problems and the employer offered her modified work, the employee believed that she could not safely perform the work and refused to perform it, as well as other modified work – At about the same time, the employee attended an employment standards fact finding meeting regarding another employee at the company and testified against the employer – The Board found that the employee's actions were not deliberate, wilful acts aimed at refusing to do work, but arose over concerns regarding her back injury – Further, there was no evidence to suggest that the decision to terminate the employee was influenced by her attendance at the fact finding and so she was not entitled to damages for reprisal – Termination and severance pay awarded; reprisal complaint quashed

HUNTER AMENITIES INTERNATIONAL LTD.; RE KAMALJIT BATTH AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1542-04-ES; Dated July 13, 2005; Panel: Peter F. Chauvin (7 pages)

Construction Industry – Issue Estoppel – Jurisdictional Dispute – *Res Judicata* – Timeliness – In a dispute over work assignment, the Cement Masons filed a complaint with the Canadian Plan Administrator against the applicant, Ellis-Don and the Labourers – The Labourers subsequently filed a jurisdictional dispute with the Board – The Plan Administrator held a hearing (where neither employer attended) and ruled in favour of the Cement Masons – The Cement Masons then (1) brought a motion before the Board to have the Labourers' JD dismissed; and (2) asked the Plan Administrator to enforce his order – The Board conducted a consultation (again, neither employer attended) and exercised its discretion not to inquire into the Labourers' complaint – The Cement Masons then referred a grievance to the Board, submitting that the applicant would not comply with the Plan Administrator's decision – Finally, the applicant filed the instant complaint (the work in dispute was completed in September 2004) – The Cement Masons argued that the JD was either untimely or was subject to the doctrines of *res judicata*, issue estoppel and abuse of process – The Board found this application to be an unvarnished attempt to re-litigate the issue already decided in the earlier JD file (a proceeding of which the applicant had notice but in which it declined to participate) – Application dismissed for all grounds cited

JOHN HAYMAN AND SONS COMPANY LIMITED, THE; RE LIUNA, LOCAL 1059 AND OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA AND ITS LOCAL 598; RE TURNER MURRAY CONTRACTORS INC., AND ELLIS-DON CONSTRUCTION LTD.; File No. 2690-04-JD; Dated July 12, 2005; Panel: Jack J. Slaughter (7 pages)

Collective Agreement – Construction Industry Grievance – This grievance concerned the employer's obligation to pay travel allowances to employees performing non-scheduled escalator repair work – In order to determine the issue the Board had to decide the consequences of a printing error in the 1980 collective agreement – The parties agreed not to change the clause at issue from the previous agreement but when the agreement was sent to the printer the word "not" in the clause was deleted – The Board held that it had jurisdiction to correct errors in collective agreements where provisions in the agreement did not state what the parties agreed to – The fact the error was present in the agreement from 1980 and had been carried forward without comment during successive rounds of collective bargaining

did not preclude the Board from finding that the actual bargaining between the parties did not include the erroneous provision – Since the employer was able to demonstrate that the missing word "not" had never been bargained out of the collective agreement in subsequent renewals the Board rectified the error in order to reflect the actual agreement reached between the parties – Given the finding regarding the error in the provisions, the Board held that the collective agreement did not require the employer to pay the travel allowance

KONE INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS LOCAL 50; File No. 1835-03-G; Dated July 18, 2005; Panel: Caroline Rowan, G. Pickell, G. McMenemy (23 pages)

Construction Industry – Construction Industry Grievance – Related Employer – Sale of Business – The Bricklayers and the Labourers each brought grievances and related employer applications against two of the responding parties ("Minty" and "Minty-Carter") – The evidence revealed that in 1980 the owner of Murard asked one of his employees, Charles Minty, to create a company through which bids for non-union work could be made – The Minty company subsequently successfully bid on two jobs; the Bricklayers grieved, and Minutes of Settlement were signed (by the owner of Murard) – Several years later, after Murard had ceased operations, Charles Minty established Minty and Minty-Carter – Minty conceded that it was a successor to Murard, but argued that Charles Minty was not a key-man in the Minty-Carter operation – The responding parties also argued that Charles Minty was young and naïve in 1980 and was not aware of the consequences of the creation of his shell company – Finally, the responding parties argued that the passage of time precluded the unions from asserting their rights at this time – The Board rejected all the responding parties' arguments and found that the companies were all related – Declaration issued without retrospective damages

MURARD MASONRY CONTRACTORS LTD., CHARLES MINTY C.O.B. CHARLES MINTY MASONRY, MINTY-CARTER MASONRY LTD.; RE INTERNATIONAL UNION OF BRICK AND ALLIED CRAFTSMEN, LOCAL 2/BRICK AND ALLIED CRAFT UNION, LOCAL 2; File Nos. 1132-04-R; 1133-04-G; 1134-04-R; 1135-04-G; Dated July 14, 2005; Panel: Marilyn Silverman, John Tomlinson, Alan Haward (12 pages)

Trade Union – Union Successor Status – COPE, Local 550 sought a declaration from the Board that there was a transfer of bargaining rights to it from OPEIU, Local 550 – OPEIU filed submissions asking the Board to stay these proceedings pending the resolution of litigation between these parties in another jurisdiction – The Board declined to await the results of the other litigation – Relying on the reasoning in *Coca-Cola Ltd.* [1987] OLRB Rep. May 658, the Board found that COPE, Local 550 had not acquired bargaining rights from OPEIU, Local 550 by reason of transfer or amalgamation – COPE was not the successor of OPEIU, but its new incarnation – Application dismissed

REHAB EXPRESS, OFFICE AND PROFESSION-AL EMPLOYEES INTERNATIONAL UNION, LOCAL 550, AND; RE CANADIAN OFFICE & PROFESSIONAL EMPLOYEES UNION, LOCAL 550; File No. 4519-04-R; Dated July 4, 2005; Panel: Ian Anderson (3 pages)

Employment Standards – Remedies – The Board confirmed the employment standards officer's findings that the employer had violated the pregnancy provisions of the Act – The Board reiterated a view initially expressed in *Rosario* [2002] OLRB Rep. May/June 505 that reinstatement should be the primary and presumptive remedy for such violations – The Board scrutinized the "loss of job" head of damage assessed by the officer – In the circumstances of this case, when reinstatement was not a viable option by the date of hearing, the Board calculated the value of the loss of job based on the employee's reduced salary in her new employment relationship – Application dismissed

SANDASTIK INC.; RE (ANGELA) DAWN LITTLE, AND DIRECTOR OF EMPLOYMENT PRACTICES BRANCH; File No. 1555-04-ES; Dated July 6, 2005; Panel: Timothy W. Sargeant (12 pages)

Employment Standards – The employer applied to review a Notice of Contravention issued against it – The employment standards officer had issued the Notice for a violation of the holiday pay provisions of the Act and, in accordance with the Regulation, had calculated the administrative penalty by multiplying the infraction by the number of affected employees – The employer admitted

the violation but argued that the quantum of the penalty was oppressive given that the amount of the wages found owing was approximately only half of the amount of the penalty levied – The Board looked to the criteria applied by the courts to determine when a penalty should be reduced and found that an amount equivalent to the wages owed would provide an adequate deterrent to this employer – Penalty reduced

STONEY'S WATERFRONT CAFÉ, 1203125 ONTARIO LIMITED O/A; RE DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2593-04-ES; Dated July 12, 2005; Panel: Brian McLean (5 pages)

Court Proceedings

Contempt – Related Employer – Stated Case – The Board stated a case to Divisional Court for contempt when the responding parties failed to attend a hearing or comply with a Board order to produce documents relevant to the issue of relatedness – The Court afforded the responding parties an opportunity to purge the contempt – When the responding parties failed to adequately address the Court's direction to comply, the Court found them in contempt, levied fines against each responding party and awarded costs against them jointly and severally

BUILD-FORCE CONSTRUCTION LTD., 1404406 ONTARIO LIMITED (C.O.B. AS BUILD-FORCE CONSTR. 2000) AND UNICOR CONSTRUCTION INC. RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 494; RE OLRB; File Nos. 1189-03-G; 1190-03-R (Court File Nos. 368/04, 415/04); Dated July 14, 2005; Panel: Matlow, Jennings, Swinton JJ. (4 pages)

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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 Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
BA International v. UA Local 412 et la Divisional Court No. 05-DV-001103	1363-04-U	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Wellington De Oliveira v. L.U.I.N.A 183 Divisional Court No. 51/05	0430-04-R	Pending
Sundial Homes (Bronte) Limited v. R.E.S Real Estate Services Limited., et al (Stated Case) Divisional Court No. 50/05	0846-03-R, 0959-03-R, 1046-03-U	Pending
Wabco Standard Trane Co. v. UA Local 787 Divisional Court No. 11/05	0194-03-G	Pending - Oct 7, 2005
Benjamin Blasdell v. UFCW Local A.F.L.-C.I.O.-C.L.C. Local 1000A; Loblaws Supermarkets Ltd. Divisional Court No. 74010/04 NEWMARKET	1431-03-M; 1341-03-U	Pending
Gerald Thomas v. SEIU Local 1.ON; Toronto East General & Orthopaedic Hospital Inc. Divisional Court No. 638/04	0281-04-U	Pending
Naseem Jamal v. OPSEU, et al Divisional Court No. 56704	2464-03-U	Pending – September 12, 2005
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending – October 31, 2005
Premier Fitness Clubs Inc. & 992434 Ontario Inc. v. Hopeton Bailey, et al Divisional Court No. 537/04	0341-03-ES	Pending
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending – Jan. 16-17/06
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 Divisional Court No. 554/04	1151-03-R	Abandoned June 17, 2005
OPSEU v. PIPSC, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Pending – September 28, 2005
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	Granted Jun 28/05 – reasons July 14/05

Case name & Court File No.	Board File No.	Status
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
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Heard – Feb. 23,24,25,28/05 - Reserved