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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of this year. Some of these decisions will appear in the November/December 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 – Reconsideration – Representation Vote – Termination – The Board reconsiders and varies its decision ([2004] OLRB Rep. July/August 80]), where it had relieved against the strict application of Rule 137, because the information provided on Form A-80 existed elsewhere in the application and any defect was not prejudicial – Although the Board reiterated that it found very little value in the Form A-80, it decided that one basis for the Form's existence was to guard against both carelessness and untruthfulness on the part of an applicant – Since the applicant's conduct in this case, raised the very issues that the Form was intended to address, the Board concluded that it would not be appropriate to relieve against the application of the Rule – Decision ordering the vote reconsidered – Application dismissed

BRICKLAND MASONRY CONTRACTING (1996) INC.; RE MR. BELMIRO CRUZ; RE MASONSRY CONTRACTORS' ASSOCIATION OF TORONTO; BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; MASONRY COUNCIL OF UNIONS TORONTO AND VICINITY; File No. 0414-04-R; Dated December 29, 2004; Panel: David A. McKee (14 pages)

Employment Standards – Employer appeal of a decision of an employment standards officer involving a determination of the number of personal leave days provided for in s. 50 of the *Employment Standards Act, 2000* – The issue before the Board was the proper interpretation of the term "year" in s. 50(5) of the Act – The Board accepted the employer's interpretation of the term "year" to mean a period of 365 or 366 days, over the Director's interpretation that "year" meant a calendar year (January to December) – In arriving at its decision, the Board applied the principles of statutory interpretation, including examining the purpose of the Act, comparing the interpretation of the term "year" in other provisions of the Act, and the plain language of the term – Where "year" is used in other provisions of the Act, it is understood to mean a period of 365 or 366 days, rather than a calendar year – Director's interpretation would result in some employees with shorter service being granted greater benefits than those with longer service within the first year of employment which is contrary to the general rule that longer service means greater entitlement and inconsistent with well-established labour relations and human resources principles – Matter remitted to parties to settle outstanding issues

CASINO RAMA SERVICES INC.; RE JANICE BOURNE ET AL, AND DIRECTOR OF EMPLOYMENT STANDARDS; File No.2588-02-ES; Dated December 3, 2004; Panel: Kevin Whitaker (11 pages)

Certification – Collective Agreement – Construction Industry – Employer Support – Practice and Procedure – Timeliness – Unfair Labour Practice – The applicant, after applying for certification for a craft unit of employees at Hydro One, filed an unfair labour practice complaint alleging the collective agreements

entered into between the intervening unions and the employer (which would make the certification application untimely) were "sweetheart deals" in violation of s. 53 of the Act – Hydro, supported by the intervening unions, moved to have the Board exercise its discretion to dismiss the complaint for delay, as it was brought 16 months after the applicant became aware of the Agreements at issue – The Board found the delay presumptively prejudicial and that there was no reasonable explanation for the majority of the delay – Applications dismissed

HYDRO ONE INC./NETWORKS; RE IUOE, LOCAL 793; RE LIUNA, AND CANADIAN UNION OF SKILLED WORKERS; File Nos. 2303 –03-R; 3173-03-U; Dated December 29, 2004; Panel: Caroline Rowan (10 pages)

Certification – Employer Support – Trade Union – Displacement application for certification by the Canadian Auto Parts Worker's Union (CAPWU) – The "five-steps" the Board has generally used to determine whether an entity is a trade union under the Act is "only a tool" to assist the Board in determining whether the two characteristics necessary to satisfy the Act's definition of "trade union" (i.e., that there be an organization of employees and that it have as a purpose the regulation of labour relations) are present – Substantial rather than strict compliance with the five steps is required – In assessing the viability of an entity for trade union status, the Board is concerned only with whether it is legally viable, rather than matters of merely practical viability – An allegation that an entity does not itself intend to function as the bargaining agent for employees, but rather intends to immediately transfer its representational rights to a third party trade union, does not warrant a finding that an entity is not an organization that has one of its purposes the regulation of labour relations where its constitution specifically identifies as its object the regulation of labour relations – There was no evidence in this case that a formal contractual relationship between CAPWU and any individuals existed, except for the bare application for membership – CAPWU's constitution did not contain any requirement for membership, commitment by members to be bound by the constitution, requirement to pay an initiation fee, nor any mechanism for accepting or rejecting members – Application for certification dismissed on the basis that CAPWU not a trade union under the Act

KUS CANADA INC.; RE THE CANADIAN AUTO PARTS WORKER'S UNION; RE THE INTERNATIONAL UNION UNITED AUTO-MOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CLC), LOCAL 251; File No.3413-03-R; Dated December 2, 2004; Panel: Mary Anne McKellar (19 pages)

Sale of Business – Sale of business application with respect to an asset purchase transaction – Assessing the nature of the transaction to determine whether a sale has been effected is not dependent on the location of the bargaining rights in issue – Whether a sale of a business has occurred within the meaning of the Act requires an understanding of the totality of the transaction in issue – The Board rejected the argument that a finding that a sale of a business had taken place would expand the bargaining rights of the applicant in this case (i.e., there was one employee in the bargaining unit at the time of the transaction and there remained one employee in the unit at the time of the application) – Bargaining rights held by the applicant union relate to activities and work performed by employees and in this case, the applicant's collective agreement covered the work associated with the activities (storing, distributing and selling interlocking paving stones) being carried on by the purchaser – Declaration of sale of business granted

LAFARGE CANADA INC., BRAMPTON BRICK LIMITED, OAKS CONCRETE PRODUCTS LTD., AND RICHVALE YORK BLOCK INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; File No.0412-03-R; Dated December 7, 2004; Panel: Harry Freedman (5 pages)

Collective Agreement – Construction Industry Grievance – *Human Rights Code* – The Union alleged that the grievor's lay-off was a violation of the collective agreement and the *Human Rights Code* and that the grievor was subject to harassment – Grievor suffered injury to his back while at work and returned to work two weeks later under modified duties and, six weeks later, was laid off – Grievor had worked in elevator industry for ten years, but less than six months with Otis – The employer had discretion under the Ontario Provincial Agreement to select employees from those with less than six months seniority – The Board found the disciplinary action was entirely related to the grievor's conduct (failure to report absence in a timely way; failure to provide medical documentation and falling asleep on the job), and not to his disability – Accordingly, there was no

finding of harassment – The employer's evidence indicated, however, that one factor in their choice to lay-off the grievor was his inability to work in the field, and the Board concluded that even though other factors considered in making the selection were appropriate, the fact that "disability" played some role in the decision tainted the entire decision – The Board further found that Otis did not accommodate short of undue hardship – The Board ordered reinstatement to employment with the intervening period to be treated as an unpaid leave of absence with accrual of seniority – Finally, the Board ordered $2500 damages for the violation of human rights

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; File No. 1548-03-G; Dated December 29, 2004; Panel: Caroline Rowan (22 pages)

Construction Industry – Construction Industry Grievance – Sector Determination – This sector dispute was over whether the Woodsworth College Residence of the University of Toronto (a 17 storey reinforced concrete structure containing 338 bedroom suites, four lecture halls, five meeting rooms, storage area, student lounge and common area, etc.) came within the ICI sector or the residential sector of the construction industry – The Board found that the Project provided more than just an apartment building constructed to provide housing; it was an integral element of the University's institutional academic program in that it was closely related to the function of the University as an educational institution – Declaration that the Project was within the industrial, commercial and institutional sector of construction industry

TORONTO CONSTRUCTION ASSOCIATION GENERAL CONTRACTORS' SECTION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; CARPENTERS & ALLIED WORKERS, LOCAL 27, UBCJA; LIUNA, LOCAL 506; TORONTO-CENTRAL ONTARIO BUILDING & CONSTRUCTION TRADES COUNCIL; RE FORMWORK COUNCIL OF ONTARIO; ONTARIO FORMWORK ASSOCIATION; METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; IUOE, LOCAL 793; File Nos. 2203-02-M; 3014-02-G; Dated December 20, 2004; Panel: Harry Freedman (8 pages)

Employment Standards – Prima Facie – Related Employer – The issue, on a referral by an arbitrator, was whether one or more employers were related for the purposes of the Act – OPSEU represented certain employees of VON-WWD, which had previously been awarded contracts by the CCACs to provide services – In 2002 VON-WWD failed to win a substantial contract and did not have the resources to pay the severance pay it was obligated to pay as a result of the termination of the employment of many employees – OPSEU grieved alleging VON-Canada and the two CCACs were related employers – On the applicant's best facts with respect to the two CCACs, the Board found that section 4 of the Act was not meant to apply to the relationship that was at issue for two main reasons: first, such a broad interpretation would lead to making employers the insurer of employment standards claims of employees who work for sub-contractors and this could not have been the legislature's intention; second, the Act recognizes in particular industries the difficulty of sub-contractors and their employees, but does not offer such protection here – Finally the Board found its interpretation consistent with the previous jurisprudence interpreting section 12 of the former Act – Application dismissed against the CCACs, continued against VON-Canada

VICTORIAN ORDER OF NURSES WATERLOO-WELLINGTON-DUFFERIN BRANCH; AND VICTORIAN ORDER OF NURSE CANADA AND COMMUNITY CARE ACCESS CENTRE FOR WELLINGTON-DUFFERIN AND COMMUNITY CARE ACCESS CENTRE OF WATERLOO REGION AND KPMG INC. RE OPSEU, LOCAL 253; File No. 4206-02-ES; Dated December 7, 2004; Panel: Brian McLean (11 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
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
Hardev Kumar v. USWA, Local 13571, et al Divisional Court No. 574/04	0151-04-U	Pending
Naseem Jamal v. OPSEU, et al Divisional Court No. 56704	2464-03-U	Pending
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending
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
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	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 Centre.** v. Queen in Right of MOL, et al Divisional Court No. 343/04	1721-02-ES	Pending – March 11, 2005
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

Case name & Court File No.	Board File No.	Status
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. 22/04	2320-03-M 2049-03-U	Pending – Feb. 7/05
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	Pending – Feb. 23,24,25/05 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	Heard – Nov. 8 & 9/04; Reserved
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Pending
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	Abandoned January 5, 2005
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending – Feb.14/05
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 Heard – Oct. 15/04, Reserved