ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

July 2005

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. Some of these decisions will appear in the May/June 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.

Employment Standards – The employer applied for review of the orders of an Employment Standards Officer requiring the payment of outstanding wages, in the form of overtime and public holiday pay – The employer argued that the employees were performing work directly related to the growing of flowers, trees, and shrubs for the retail and wholesale trade and so were exempt under Regulation 285/01 – The Board held that to fall under this exemption the employer must show that its primary function is to grow flowers or trees and shrubs for the retail and wholesale trade and also that the employees' employment was "directly" related to the business of growing flowers, or trees and shrubs – The Board found that the employer was in the business of the retail trade and the employees' employment was not directly related to the business of growing flowers, or trees and shrubs for the retail and wholesale trade – Major part of Application dismissed

901975 ONTARIO INC. C.O.B. AGRAM GARDEN CENTRE., RE PAUL DUNNING ET. AL, AND THE DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1640-04-ES; Dated June 1, 2005; Panel: Tanja Wacyk, (12 pages)

Certification – Construction Industry – Local 183 sought certification for both an industrial and a construction bargaining unit – Part of the employer's business involved cleaning, inspecting and testing water mains installed in new subdivisions before the subdivision services were assumed by the municipality – The employer asserted that it was not engaged in a business in the construction industry since it did not do any "construction", as its work related to testing, inspecting and cleaning of water mains constructed by sewer and water main contractors – The Board found that until the water mains being constructed in a new subdivision can be used for their intended purpose, they remain under construction – The cleaning, inspecting and testing of the water mains was an element of the construction that must be complete prior to the turnover to the municipality – Therefore the Board was satisfied that the cleaning, inspecting and testing of the water mains was an element of the construction of those water mains – Matter continues

A-1 HYDRANT SERVICES LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; File Nos. 0943-03-R, 0944-03-R; Dated June 29, 2005; Panel: Harry Freedman, (7 pages)

Construction Industry – Related Employer – Sale of Business – Voluntary Recognition – The Sheet Metal Workers filed this application to extend their bargaining rights from Adam Clark Company Ltd to the other responding parties – The applicants claimed that the rights were gained when the project manager at the Lockerbie and Hole company office in Thunder Bay signed the Memorandum of Agreement – The respondents claimed that the project manager did not have the authority to bind the companies – The Board held that the project manager had

ostensible authority to bind the companies – The Board noted that in the construction industry the signing of voluntary recognition agreements is a common occurrence and customarily, unions do not make extensive inquiries about the signing authority of the employer's representative – Further, Lockerbie & Hole sought out the applicant to enter in a voluntary recognition agreement, the agreement was signed in their offices, and there was no evidence of repudiation after Lockerbie & Hole became aware that the project manager signed the agreement – Agreement is binding – Matter continues

ADAM CLACK COMPANY LTD., S.I. GUTTMAN INC., LOCKERBIE & HOLE CONTRACTING LIMITED, LOCKERBIE & HOLE INC., LOCKERBIE & HOLE INDUSTRIAL INC.; RE ONTARIO SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 473; File No. 1980-03-R; Dated June 23, 2005; Panel Christopher J. Albertyn, (8 pages)

Collective Agreement – Construction Industry – Religious Exemption – Trade Union – In this application for a religious exemption under s. 52 of the Act by a construction industry employee, the Board first found that the employee's religious convictions met the subjective test (belief was conscientious, consistent and genuine) and the objective test (they reflected the articles of faith of the individual's primary association, and that association would be in jeopardy if the exemption were not granted) – The Board next found that although the employer is not a party to the provincial agreement, it is a collective agreement "entered into" by the employer and the union – Further the collective agreement need not be a first collective agreement, but only one "first entered into" with the employer – Finally, the Board found there was no conflict between s. 161(4) and s. 52, since the conflict was not between the two sections of the Act, but between the provincial agreement and s. 52 – Therefore, s. 52 applied to the construction industry provisions – Application granted

BOLDT ELECTRICAL CO. (1991) LTD, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; RE VICTOR ALLAN; File No. 1077-04-M; Dated June 15, 2005; Panel: Christopher J. Albertyn, (8 pages)

Construction Industry – Employer – Jurisdictional Dispute – Practice and Procedure – The general contractor, PCL, who has a collective bargaining relationship in the ICI sector with the applicant, Carpenters, subcontracted work to Flynn, who had relationships with both the Carpenters and the Sheet Metal Workers – Flynn assigned the work, claimed by the Carpenters, to the Sheet Metal Workers – PCL asked the Board, as a preliminary matter, to determine it was not the "employer" for the purposes of section 99 – The Board noted that the general contractor's practices and the choices it makes are significant to the Board's determination for the reasons set out in *Eastern Construction* – The Board was satisfied that section 99 was cast broadly enough to make a general contractor an "employer" even where it does not directly hire employees – The Board declined to decide whether PCL was an employer on a preliminary basis – Matter continues

FLYNN CANADA LTD., PCL CONSTRUCTORS CANADA INC., SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION 47, RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 93; File No. 0715-04-JD; Dated June 22, 2005; Panel Mary Ellen Cummings, (6 pages)

Timeliness – Termination – The Applicant sought a declaration that the Responding party no longer represented employees in the bargaining unit – The Respondent issued a notice to bargain with the employer on October 20, 2003, and the Minister appointed a conciliator on October 30, 2003 – The Collective Agreement expired in January 2004, and the application was filed on January 31, 2005 – The Applicant argued on the basis of s. 18(4) of the *Act* that another open period for termination applications had commenced – The Applicant supported this by stating that the purpose of the *Act* was to ensure expedient labour relations – The Respondent argued that the application should be dismissed because the period for termination applications remained closed since the conciliation process had not been exhausted – The Board held that in the absence of the appointment of a second conciliation officer, s. 18(4) does not apply – Accordingly, the period for termination applications was still closed pursuant to s. 67(2) and the application was not timely – Application dismissed

MAPLE LEAF MEATS INC.; RE JACK MERAL; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AFL-CIO-

CLC, LOCALS 175 AND 633; File No. 3697-04-R; Dated June 1, 2005; Panel: Tanja Wacyk, R. O'Connor, R.R. Montague (9 pages)

***Prima facie* motion – Strike – Unfair Labour Practice –** The employer alleged an unlawful strike by its non-unionized employees who were unable to or refused to cross a picket line – On a motion that the application does not disclose a *prima facie* case, the Board, following *United Steelworkers of America* [1995] OLRB Rep. June 825, found that, even assuming there was a refusal to work, without an allegation that the acts were done in concert or combination to limit the applicant's business, there was no breach of the Act – Motion granted; application dismissed

UNILUX BOILER CORP. AND UNILUX V.F.C. CORP; RE UNITED STEELWORKERS OF AMERICA, LOCAL 3950, BAYNE FRASER, AUGUSTO D'INNOCENZO, HUGH LOPEZ AND STUART DEANS; File No. 4172-04-U; Dated June 6, 2005; Panel: Brian McLean (8 pages)

Certification – Construction Industry – Remedies – Representation Votes – Unfair Labour Practice – LIUNA filed an application alleging that the responding party had interfered with the employees' selection of the applicant as their bargaining agent contrary to sections 70, 72, 76 and 77 – The basis of the allegation was that the responding party had distributed a leaflet to the employees which contained false information designed to mislead the employees into thinking that a vote for the union would endanger their job security – Further the owner allegedly directly told a group of employees, "…if the union got in they would shut the company down" – The Board noted that it must always place particular scrutiny on statements by an employer designed to threaten the job security of employees as a consequence of supporting a union – The Board held that even if the owner only told employees about another company that was forced to shut down after a union was organized (as he claimed), taken together with the leaflet, the actions constituted unlawful intimidation, threats and coercion, designed to interfere with the wishes of employees regarding this application for certification – The Board ordered a new vote at a time chosen by the applicant

WEST ELGIN CONSTUCTION LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; File Nos. 2677-04-R, 2809-04-U; Dated June 1, 2005; Panel: Norm Jesin (8 pages)

Court Proceedings

Duty Of Fair Representation – Judicial Review – The Applicant applied for judicial review of the Board's decision dismissing his application on the basis of excessive delay and prejudice to the Union and Employer—The Applicant alleged that the delay was caused by his health problems — The Court dismissed because the Applicant's illness had not been raised before the Board.

BORG, VINCENT; RE THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION, THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF HEALTH) AS REPRESENTED BY MANAGEMENT BOARD OF CABINET, THE MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO AND ONTARIO LABOUR RELATIONS BOARD; File No. 1208-02-U (Court File No. 83/04); Dated June 9, 2005; Panel: Meehanj, Matlow, and Swinton JJ (2 pages)

Duty Of Fair Representation – Judicial Review – The Applicant applied for judicial review of the Board's decision and reconsideration dismissing his duty of fair representation applications on the grounds that the Board had demonstrated an apprehension of bias and had discriminated against him due to his medical condition – The Applicant filed a duty of fair representation application in 1997 that was dismissed by the Board – Seven years later the Applicant filed another claim alleging that the Union had failed to represent him during the years of 1986 to 1989 – The Board dismissed that application because the Applicant failed to raise an issue that was not already considered in his 1997 application – The Applicant filed a reconsideration on the grounds that the Board failed to accept that the Applicant's disability was a credible explanation for his failure to raise the application before 2004 – The Board dismissed the application for reconsideration – The Court found that the Board had properly considered the Applicant's medical condition and ruled that an apprehension of bias was not raised solely because the same Vice-Chair had considered both the duty of fair representation and reconsideration applications – The Court dismissed the application.

KUMAR, HARDEV; RE UNITED STEEL WORKERS OF AMERICA, LOCAL 13571 (FORMERLY LOCAL 2858 UNITED STEEL

WORKERS OF AMERICA), TOWER AUTOMOTIVE INC. (FORMELY ALGOODS INC. OR ALGOODS LTD. DIVISION OF ALCAN) AND OLRB; Dated June 6, 2005; File No. 0151-04-U (Court File No. 574/04); Panel: O'Driscoll, Jennings, Swinton JJ. (7 pages)

Contempt – Discharge – Health and Safety – Judicial Review – The Board found that the applicant's work refusal was not *bona fide* and that his termination was not a reprisal for acting in compliance with or seeking the enforcement of the *Occupational Health and Safety Act* – The Board also declined to substitute a lesser penalty for the discharge under s. 50(7) of the OHSA – The Board further declined to state a case for contempt to Divisional Court based on the allegation that the applicant had distributed documents received in another Board proceeding, in breach of an implied undertaking that such documents are to be used only in the litigation for which they were produced – On judicial review, the Divisional Court held that the Board had denied the applicant's right to a fair hearing when it consolidated the reprisal and contempt matters into one proceeding – At the Court of Appeal, the ruling of the Divisional Court was overturned – The Court of Appeal held that the lower court had misapprehended the nature of both the OHSA reprisal and the SPPA contempt proceeding – On the reprisal, the Divisional Court misapplied the burden of proof and incorrectly restricted the parameters of the evidence the employer sought to adduce – With respect to the contempt, the Divisional Court failed to bifurcate the Board's role in determining whether to state a case from the Court's role to determine whether a person should be punished for contempt – Appeal allowed, Board decision restored – Application for leave to appeal from the judgement of the Court of Appeal for Ontario was dismissed by the Supreme Court of Canada

MCNAUGHT, WILLIAM; RE TTC AND ITS SUPERVISORS, CHIEF GENERAL MANAGER DUCHARME, GENERAL MANAGER G. WEBSTER, S. QUIGLEY, HUMAN RESOURCES DEPARTMENT, D. HAFFEY, AND SUPERINTENDENT J. HAFFEY, DANFORTH BUS DIVISION AND OLRB; File Nos. 3616-99-U; 3297-99-OH (S.S.C No. 30842) Panel: Major, Fish, Abella JJ. Dated: June 30, 2005

****

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
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
William McNaught v. Toronto Transit Commission, et.al Supreme Court File No. 30842	3616-99-U, 3297-99-OH	Leave to appeal to SCC – Dismissed June 30, 2005
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
Hardev Kumar v. USWA, Local 13571, et al Divisional Court No. 574/04	0151-04-U	Dismissed – June 6, 2005
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
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 – June 17, 2005
OPSEU v. PIPSC, **The Ottawa Hospital**, OLRB	0372-04-R	Pending – September 28,

Case name & Court File No.	Board File No.	Status
Divisional Court No. 378/04		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 to follow
Vincent Borg v. OPSEU, The Crown in Right of Ontario et al Divisional Court No. 83/04	1208-02-U	Dismissed – June 9/05
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
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Dismissed – Feb.14/05 Reasons to follow – Seeking leave to appeal to CA – Dismissed