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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 October of this year. These decisions will appear in the September/October 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.

Certification – Construction Industry – Practice and Procedure – In this application for certification under s. 128.1 the responding party employer asked the Board, among other matters, to compare membership cards with sample signatures, a "past practice" of the Board – Although the Board did make comparisons for the purposes of this decision (and found no discrepancies), the Board discusses the futility of engaging in this exercise – Matter continues

ASSOCIATED PAVING COMPANY AND/OR ASSOCIATED PAVING CO. LTD. AND/OR ASSOCIATED PAVING LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File No. 1997-05-R; Dated October 13, 2005; Panel: David A. McKee, John Tomlinson, Alan Haward (5 pages)

Practice and Procedure – Unfair Labour Practice – The responding party asserted that parts of the applicant's pleadings constituted privileged information relating to settlement discussions during the grievance/mediation process and requested that the Board strike the impugned paragraphs – The Board reviewed the law that settlement discussions are privileged from disclosure and the policy underlying this principle; the Board noted that this privilege is not absolute and the exceptions (proof of fraud, abuse of process or settlement of the issues in dispute) were to be narrowly construed – The Board struck some paragraphs since they related to events occurring during the mediation/arbitration process – Matter continues

CITY OF OTTAWA AND KEVIN LEMENCHICK; RE OTTAWA CARLETON PUBLIC EMPLOYEES' UNION, LOCAL 503 AND STEVEN MURPHY; File No. 0109-05-U; Dated October 3, 2005; Panel: Jack J. Slaughter (8 pages)

Construction Industry – Health and Safety – Trades Qualification and Apprenticeship Act – The Inspector found that workers installing sewers and drains at a residential project were not plumbers under the TQAA, and accordingly the employer was not in compliance with section 3 of Regulation 572/99 – The issue to be determined by the Board was whether the laying of the pipes was the work of a plumber, since if it was the Regulation prohibits anyone other than a plumber from performing it – The TQAA plumbing regulation, defining the work of a plumber, does not include a person engaged in "the laying of metallic or non-metallic pipe into trenches to form sanitary or storm sewers, drains or water mains", and the definition of "trench" in the OHSA Construction Regulation defines a trench as an excavation where its depth exceeds its width – Rather than finding the definition of "trench" in the OHSA determinative, and in light of the history of the exclusion, the Board defined the term "trench" in the context of, and for the purposes of, the TQAA, in its ordinary and unspecific meaning as an excavation in the earth without regard to relative dimensions of the excavation – Accordingly, the laying of metallic and non-metallic pipe into trenches is not work that only a plumber can do pursuant to the TQAA plumbers regulation, and accordingly such work is not

covered by the s. 3 of the OHSA Regulation – Appeal allowed and Order rescinded

DONALD CONSTRUCTION LTD.; UNIVERSAL WORKERS UNION, LOCAL 183, AND MR. BRYAN PITT, INSPECTOR; RE ONTARIO CONCRETE & DRAIN ASSOCIATION; METROPOLITAN TORONTO APARTMENT BUILDERS ASSOCIATION; TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU; File No. 1013-05-HS; Dated October 26, 2005; Panel: David A. McKee (9 pages)

Construction Industry Grievance – Practice and Procedure – The Board declines to order pre-hearing production of documents during the 14-day period after a referral is filed and sets out its reasons for not doing so: as this is an expedited process, it is not possible to expeditiously determine whether the documents are arguably relevant; given the statutory time restrictions required there may be little opportunity for the responding party to comply with an order; there is an issue of Board resources applied to the matter at stake; and finally most grievance referrals result in a settlement – Request denied without prejudice to the applicant's right to renew the motion

JACOBS CATALYTIC LTD.; IBEW, LOCAL 353; File No. 2127-05-G; Dated October 11, 2005; Panel: David A. McKee (2 pages)

Certification – Discharge – Interim Relief – Practice and Procedure – Unfair Labour Practice – The union sought reinstatement of two employees pending adjudication of the unfair labour practice complaints in the main application – At the outset of the consultation, the Board advised the parties that the process it intended to use would not be an oral hearing, but a summary consultation process designed to elicit further information so the Board could answer the questions posed by s. 98 – The Board also advised the parties it intended to question deponents and might permit the examination of deponents by counsel following the Board's questioning – Although both parties opposed the Board's proposed process the Board proceeded pursuant to Rules 76 and 77 – The Board analyzed the requirements under sections 98(2) & (3) and concluded that the Board must conduct a summary process, designed in part to determine whether there is an appearance of a causal relationship between the exercise of rights and the employer's impugned conduct – On the merits of the interim application, the Board found the following information significant: the timing of the discharges, the employer's knowledge and the employer's past practice in dealing with the culpable behaviour at issue – Application granted, reinstatement ordered

PATROLMAN SECURITY SERVICES INC.; RE TEAMSTERS LOCAL UNION NO. 938; File No. 1928-05-M; Dated October 6, 2005; Panel: Kevin Whitaker (13 pages)

Construction Industry – Duty of Fair Referral – Trade Union – This complaint arose from Local 586's decision to suspend the applicant from referral to employment from the hiring hall – The union concluded that the applicant's performance as an electrician was lacking in skill, productivity and ability to work with others, however it failed to conduct an investigation of all the complaints it received against the applicant nor did the union give the applicant sufficient notice of the problem to give the member an opportunity to change – The Board found that removing a member from the hiring hall on which his or her livelihood depends, without giving him or her any warning, or any opportunity to explain the circumstances or to improve was arbitrary and a breach of section 75 – The Board ordered the union to reinstate the applicant to the hiring hall list and to refer him to employment in the same manner as others with appropriate damages – Application granted

PODEJKO, JAN; RE IBEW, LOCAL 586; File No. 4546-04-U; Dated October 26, 2005; Panel: David A. McKee (6 pages)

Discharge – Interim Relief – Practice and Procedure – Unfair Labour Practice – The union alleged three employees were discharged contrary to the Act as a result of their participation in a campaign to establish bargaining rights and sought their reinstatement on an interim basis pursuant to s. 98 – The Board considered, in obiter, its jurisdiction to question witnesses as part of expediting proceedings, and the importance of the Board determining the interim application expeditiously on the basis of section 98 while leaving firm factual findings to the main application – The Board found the conditions under s. 98 were met for one employee and ordered reinstatement, while the interim application was dismissed on the other two

SARNIA PAVING STONE LTD.; DINO CASCHERA; RE LIUNA, LOCAL 1089; File Nos.

1792-05-U; 1807-05-U; Dated October 3, 2005; Panel: Norm Jesin (11 pages)

Certification – Construction Industry – Practice and Procedure – Remedies – The applicant, having filed no membership cards in its application for certification under s. 128.1, also applied for relief (certification) under section 11 – The union's own material clearly established that fewer than 40 per cent of the employees in the bargaining unit were its members – The Board found that s. 128.1(7), which requires the Board to dismiss an application for certification where it is satisfied that less than 40 per cent of the employees in the bargaining unit are members of the union, was clear on its face; the section was not subject to s. 11 and it was not referred to in s. 11(3), which permits the Board to certify a trade union despite section 8.1 or 10(2) – The Board found that s. 128.1 provides a complete comprehensive code where the union has elected to proceed under that section and that sections 128.1(8) and (9), the remedial dismissal provisions applicable to membership evidence, support that view – The Board also found it significant that s. 128.1(7) does not state that it is subject to section 11, whereas 128.1(14)(e) does, and that the language of section 11 leads to the conclusion that it was intended to deal with applications under s. 8 – Finally, the Board also found that the applicant could not apply for certification directly under s. 11 – The Board allows the applicant leave to amend its application to one made under section 8, given that there is no prejudice to the responding party – Hearing continues

SOUTHSIDE CONSTRUCTION (LONDON) LIMITED; RE LIUNA, LOCAL 625; File No. 1580-05-R; Dated October 17, 2005; Panel: Harry Freedman (9 pages)

Health and Safety – Suspension – The inspector made three orders against Tembec, arising out of an injury at its sawmill in Timmins – Tembec applied for suspensions of the Orders – The Board applied its usual criteria and found the orders were so vague (they did not set out what it was that Tembec was required to do or not do, or what was deficient in Tembec's policy or what exactly the problem was that needed to be remedied) as to be unenforceable – As a result the Board found that Tembec was prejudiced, that a strong *prima facie* case existed and that worker safety was not endangered – Orders suspended

TEMBEC INDUSTRIES INC. (TIMMINS SAWMILL); RE WAYNE PEDDIE, AND ROGER FONTAINE, INSPECTOR; File Nos. 1939-05-HS; 1940-05-HS; Dated October 11, 2005; Panel: David A. McKee (9 pages)

Certification – Related Employer – Sale of Business – Three applicant unions (SEIU, ONA & OPSEU) brought related employer/sale of business applications alleging that TBRHSC and S & R were related (or a sale under the Act had occurred) – TBRHSC, an acute care facility, formed from McKellar General Hospital and Port Arthur General Hospital in 1995, also housed, by necessity, alternative level care (ALC) patients, putting pressure on its ability to service patients requiring acute care – S & R, a large privately-held real estate and property management company whose prominent business activities involve the ownership and management of condominiums, long term care facilities, and retirement homes, provided the management services, through a Long Term Care Management Agreement, for the McKellar Long Term Care Community (MLTCC) facility, for which TBRHSC was provided a license and funding by the Ministry of Health and Long Term Care – The CAW's application for certification for some of the employees of S & R working at MLTCC was consolidated with these applications – The Board found that the three elements to make a declaration under s. 1(4) were met: first, each of TBRHSC and S & R constituted an appropriate entity such that more than one corporation existed; second, the businesses were related or associated since they both were in the business of providing long term care (TBRHSC as owner, S & R as owner/operator) and since they were functionally integrated; finally, they were under common control and direction since MLTCC is akin to a "joint venture" between TBRHSC and S & R, rather than a contracting out – Having found the employers related, the Board exercised its discretion to issue a declaration because work was taken away from employees and to allow the applicants to have closer access to the true locus of power (the Ministry) – Related employer declaration made

THUNDER BAY REGIONAL HOSPITAL AND STEEVES & ROZEMA ENTERPRISES LIMITED; RE SEIU, LOCAL 268; RE CAW-CANADA; File Nos. 3755-03-R; 4107-03-R; 4324-03-R; 2369-04-R; Dated October 17, 2005; Panel: Brian McLean (25 pages)

Court Proceedings

Collective Agreement – Construction Industry Grievance – Judicial Review – The Board found that the employer, Wabco, on the signature by a Toronto District office manager, was bound beyond the Toronto district office – The Board was satisfied that the manager had signed a national agreement on behalf of the company, that he was a senior official for the company in Canada, and that for labour relations purposes, parties should be strictly held to what they sign – Accordingly the Board found that Wabco was bound to the MASCA national agreement – The Court found the standard of review to be one of patent unreasonableness, and found that the Board's reasons as a whole supported its decision – There was sufficient evidence for the Board to come to the conclusion that the manager's signature bound the company to all of its operations, including Ottawa, and for the Board to draw the inference that the reference to the Trane Company was to the national corporation – Application for judicial review dismissed

WABCO STANDARD TRANE CO.; RE UA; RE UA, LOCAL 787; RE OLRB; File No. 0194-03-G (Court File No. 11/05) Dated: October 14, 2005; Panel: Epstein J., Then J., Lax J. (6 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
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 WHITBY	3704-04-U	Pending
Leonard Gott v. Director of Employment Standards, et al Divisional Court No. SC-05-24523-00 (Civil Suit)	0444-02-ES; 1537-03-ES	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
BA International v. UA Local 412 et la Divisional Court No. 05-DV-001103	1363-04-U	Pending – Nov. 29/05
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 – Oct. 14/05
Wabco Standard Trane Co. v. UA Local 787 Divisional Court No. 11/05	0194-03-G	Dismissed Oct. 14, 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
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending – Oct. 31, 2005
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending – Jan. 16-17/06
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