ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

May 2005

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April of this year. Some of these decisions will appear in the April/May 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 – **Jurisdictional Dispute** – The applicant Ironworkers challenged a work assignment from Alberci Constructors Ltd. ("Alberci") to the Millwrights – The work in dispute was characterized by the Ironworkers as the reinforcement of steel roof trusses at the Windsor Ford Plant from which a newly installed conveyor was suspended – The Millwrights and Alberci argued that the work disputed by the Ironworkers was but a small portion of the work integral to the entire work assignment, namely an installation of a material handling system – The Millwrights and Alberci argued that the work in dispute was broader than the description offered by the Ironworkers – Alberci submitted that the Ironworkers attempted to incorrectly isolate a subset of work that was already properly assigned to a 50/50 composite crew of Ironworkers and Millwrights – The Board applied the relevant test for determining the outcome of a jurisdictional dispute (see for example Kvaerner Constructors Ltd., [2004] OLRB Rep. May/June 576) – The Board concluded that the following factors favoured the Ironworkers: trade agreements, safety, skills/training and economy/efficiency – The Ironworkers met the burden of proof and established a superior claim to the disputed work – The Board agreed with the Ironworkers' description of the disputed work and ordered that the work assignment be given exclusively to the Ironworkers.

ALBERCI CONSTRUCTORS LTD., RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700; MILLWRIGHTS, LOCAL 1244; UNITED BROTHERHOOD OF CARPENTERS AND LOCAL JOINERS OF AMERICA; File No: 1440-03-JD; Date: April 13, 2005; Panel: Jack J. Slaughter, Vice-Chair (10 pages)

Employment Standards - The applicants Fascia and Maruzzo sought review of orders to pay wages to a former employee – Fascia and Maruzzo were directors of the company which employed the employee – Fascia resigned as a director prior to the employee's civil claim for wages and two years before the *Employment Standards Act* ("*ESA*") order to pay was issued – Maruzzo resigned as a director ten months before the *ESA* order to pay was issued – Fascia argued that the Board had no jurisdiction to enforce an *ESA* order since no liability for employee wages may accrue to directors of corporations that were incorporated in jurisdictions outside of Ontario – The Board held that section 80(4) of the *ESA* did not operate to insulate directors of corporations incorporated outside Ontario from orders to pay wages made under the *ESA* – The three exceptions noted in section 80(4) of the *ESA* are read conjunctively – The Board had no jurisdiction to interfere with the Employment Standards Officer's determination of which corporate directors were the subject of the orders to pay - Application dismissed

FASCIA MICHAEL, A DIRECTOR OF WORLD WISE TECHNOLOGIES INC.; BRUNO MARUZZO, A DIRECTOR OF WORLD WISE

TECHNOLOGIES INC.; RE MING YUAN LIU; DIRECTOR OF EMPLOYMENT STANDARDS; Board File Nos. 2597-03-ES, 2637-03-ES; Dated April 7, 2005; Panel: Mary Anne McKellar, Vice-Chair (6 pages)

Certification – Constitutional – Construction Industry – Employer – Two previous Board decisions determined that both the Greater Essex School Board and the Windsor Essex School Board ("the applicants") met the *Labour Relations Act* (the "*Act*") definition of non-construction employer – The Carpenters requested that the Board decline the applicant's request for a non-construction employer declaration and further requested a reconsideration of the Board's decision in *Greater Essex District School Board*, [2003] OLRB Rep. Jan./Feb. 74 – The Carpenters argued that the *Act*'s non-construction employer provisions operated to exclude construction employees from bargaining separately as a trade – As a result, construction employees would lose access to the special protections of the Act, such as centralized bargaining, subcontracting protection and superior wages – In the alternative, the Carpenters argued that if construction employees were represented by a trade union that did not pertain to the construction industry, the construction employees would become the minority within these bargaining units – The Carpenters stated that construction employees are left without protection as a direct result of the non-construction employer provisions in the *Act*, resulting in a violation of the freedom of association provision, section 2(b) of the *Charter of Rights and Freedoms* (the "*Charter*") – The Board found that a determination that a school board is a non-construction employer merely denies the Carpenters their preferred bargaining structure – Section 2(b) of the *Charter* was not violated when a group was denied from participating in a particular bargaining structure – The Board found it incorrect to assume that construction industry employees would not be able to be certified as a craft bargaining unit under the general provisions of the *Act* – The Carpenters failed to establish that their members were excluded from all protected bargaining structures, therefore no *Charter* violation occurred – The Board affirmed that the Greater Essex District School Board and the Windsor Essex School Board were non-construction employers – The Board denied the Carpenters' reconsideration request.

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; WINDSOR-ESSEX CATHOLIC DISTRICT SCHOOL BOARD; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 494; CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; ATTORNEY GENERAL OF ONTARIO; File Nos. 3398-00-R, 3426-00-R; Date: April 20, 2005; Panel: Mary Ellen Cummings, Alternate Chair (17 pages)

---

construction Industry Grievance – Jurisdictional Dispute – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – These four applications (grievance, jurisdictional dispute, 69/1(4), and unfair labour practice) all arose from the same set of facts in which the applicant alleged that drawings with respect to certain work were fraudulently altered to justify a decision made for improper motives to assign work, already assigned to the IBEW, to the Ironworkers – The applicant requested that the matters be heard together, expeditiously, when the grievance is scheduled to be heard – The Board noted that while hearing all the matters together expeditiously or at least by the same panel would make some sense, it is not so compelling with respect to the jurisdictional dispute – The request must be weighed against two other considerations: mediation and Board resources – The Board found that to outweigh the value of mediation and the needs of other parties urgency must be considerable – The Board scheduled only the grievance in the normal course and gave procedural directions for the other three applications – Hearings continue

TRIPLE CROWN ENTERPRISES LTD., RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 105; File No: 0129-05-G; Date: April 15, 2005; Panel: David A. McKee, Vice-Chair (4 pages)

Construction Industry – *Prima facie* motion – Related Employer – Sale of a Business – The applicant union sought a declaration that the responding parties (Quinte and Peters) were bound to the Provincial Agreement by reasons of a sale of business and that the responding parties were one employer for the purposes of the Act and the affected employees were in one bargaining unit – The applicant alleged that Quinte and Peters merged their operations under the name Peters and that in doing so junior employees working for Quinte were transferred from Quinte to Peters, and senior employees from

Peters were laid off – The motion, which included a concession that both parties were bound to the Provincial Agreement, argued that the Board would not exercise its discretion under either 69(6) or 1(4) – Although the Board has not used its power under 69(6) to rectify seniority issues arising from a sale of a business, the Board could not be certain that it would refuse to exercise its discretion in these circumstances – Additionally, the Board could not say there was no reasonable likelihood that the applicant would be able to persuade it to exercise its discretion to grant a single employer declaration – Although the applicant continued to hold bargaining rights for employees of both Quinte and Peters and they were both bound by the Provincial Agreement, the transaction between them resulted in the senior employees losing their jobs while junior employees continue to be employed – As a result, the Board could find it appropriate to issue a single employer declaration – Both motions to dismiss were dismissed – Hearing continues

QUINTE CRANE RENTALS INC., AND C.A. PETERS CRANE RENTALS INC., RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 3775-04-R; Dated April 18, 2005; Panel: Harry Freedman, Vice-Chair (6 pages)

Court Proceedings

Employment Standards – Judicial Review - In this employer appeal, the Board considered whether the employee had voluntarily quit her employment or was unlawfully terminated upon her return from maternity leave - The Board found that neither of the versions of the parties was more reliable or probable than the other, and therefore was unable to conclude whether there had been a termination or resignation - Accordingly, the Board held that the employer had not discharged the statutory burden of proof that it did not violate section 74 of the Act - In its assessment of an appropriate remedy, the Board determined that the Employment Standards Officer had not sufficiently entertained the remedy of reinstatement due to the employee's unproven allegation of a "poisoned" environment - The Board concluded that there must be very compelling reasons not to consider the remedy of reinstatement, that there was nothing particularly egregious about these circumstances, and that the Officer should have ordered reinstatement - The damages were thereby reduced as the employer had offered to continue the claimant's employment - Application allowed in part

On judicial review the applicant argued that the statutory burden under section 74(2) was contrary to the presumption of innocence and that since the Director's policies were not followed section 89(2) of the Act was breached, resulting in an unfair investigation - The Court rejected the applicant's complaints under sections 74(2) and 89(2), stating that the Board was bound to enforce the statutory burden - The Court found that no denial of natural justice or due process occurred - Given the wording of the Act and the expertise of the Board, the appropriate standard of review was reasonableness - The Court stated that where there is conflicting evidence as to essential facts, the Board is in the best position to assess the evidence and find facts - In this case, the Court found that the Board had ample evidence to support its factual findings - Despite the existence of conflicting evidence, the Board acted within its jurisdiction in finding that the complainant had quit her job - Application for judicial review dismissed

SQUARE ONE DENTAL CENTRE HAWRYLY SHYN, DR. NICHOLAS; DR. ROBERT KRZEWSKI AND DR. NANCY TING OPERATING AS; RE: DELORES, A.K.A. CHRISTINE JABALEE AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1721-02-ES; (Court File No. 343/04) Dated April 28, 2005; Panel: Lane, Howden and Molloy JJ. (7 pages).

******

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
Biasutti Drywall Services et al v. Int'l. Brotherhood of Painters & Allied Trades, Local 1891 Divisional Court Nov. 05/245DV - HAMILTON	0630-03-R	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	Pending – Seeking leave to appeal to SCC – March 29, 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	Pending – May 25, 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

Case name & Court File No.	Board File No.	Status
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 – Stay (by order of Bankruptcy court)
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	Heard – March 11, 2005 – Dismissed- April 28, 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	Pending – June 1,2005
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 – 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 – March 29, 2005