ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

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June 2005

Scope Notes

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

Health and Safety – The Ministry of Labour sought an appeal and suspension of an order issued against it by one of its inspectors – The order purported to require the Ministry to comply with its policies and procedures relating to proper handling of explosives – Dealing with the suspension request only, the Board found that the Ministry had made a strong *prima facie* argument for the success of the appeal, the Ministry being the regulator of compliance and not the entity required to comply with its policy – Suspension request granted

ALBANESE BART, DISTRICT MANAGER-SUDBURY WEST MINISTRY OF LABOUR; RE GERRY GIASSON, INSPECTOR; OPSEU; Board File Nos. 0449-05-HS, 0450-05-HS; Dated May 27, 2005; Panel: Marilyn Silverman, Vice-Chair (3 pages)

Duty of Fair Representation – *Prima Facie* Motion – The union challenged this s. 74 complaint, arguing that the applicant had failed to plead facts to support the conclusions he sought the Board to reach – The application, on its merits, asserted that the union had deliberately sabotaged a displacement grievance and acted in a manner that was "seriously arbitrary" – The Board found there to be a material difference between facts and the conclusions one might draw from them – In two separate arbitrations of the applicant's grievances, arbitrators found: 1) that he was not "qualified to perform the work of the identified employee" and 2) that he was not "qualified to perform the required duties" – Ultimately the Board held that the union's pursuit of the grievances was proper and there were no facts alleged to sustain a conclusion that the union had tried to undermine the chances of success of the grievances – Motion granted, application dismissed

BOUCHARD MICHAEL; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION; THE MINISTRY OF THE ENVIRONMENT AND ENERGY; Board File No. 3786-04-U; Dated May 9, 2005; Panel: David A. Mckee, Vice-Chair (14 pages)

***Bankruptcy and Insolvency Act* – Employment Standards –** The applicant, CDA, sought to review an officer's finding and order that it was a related employer within the meaning of the *Employment Standards Act, 2000* – Subsequent to filing the application, CDA filed an assignment in bankruptcy – CDA argued before the Board that the assignment stayed all proceedings against it (including the claims originally filed by the employees) and that the money held by the Director should be returned to CDA – The Board was asked to determine whether the funds held by the Director in trust pending the review are the "property" of the employer (in which case a stay of proceedings would obtain), or are "assets" of the employees (where no stay would apply) – The Board held that the money in trust belongs to the applicant employer because, in the context of an application for review, there has not been a final and binding determination of the issue of entitlement – The proceedings were stayed – Having stayed the proceedings, the Board held

that it had no jurisdiction to order the Director to release the funds – Application stayed

CDA INDUSTRIES INC.; RE TRUDY CHILVERS, MIKE CLAY, TERRY LYNNE ELDRIDGE, CLYDE A. MARTIN, WOODY MAYNE, SHELLEY MCKAY, MICHAEL NORWOOD, LIDIA SALERNO, SHAWN TALBOT, PAUL TERECH, SANDRA WHITEHOUSE AND DIRECTOR OF EMPLOYMENT STANDARDS; Board File No. 1433-04-ES; Dated May 26, 2005; Panel: Ian Anderson, Vice-Chair (6 pages)

Bargaining Unit – Certification – The dispute in this application for certification concerned the number of Port Hope fire stations required to comprise an appropriate bargaining unit – The union asserted that the bargaining unit could be composed of one station, while the Municipality argued that the bargaining unit must include all of the fire stations in Port Hope – The Board ruled that while the bargaining unit proposed by the union represented an adequate community of interest, the exclusion of the other fire stations could lead to serious labour relations harm because of: potential tensions arising between employees and bargaining units, jurisdictional or inter-employee rivalries, work-sharing and technological change difficulties – The Board ruled that the appropriate bargaining unit should include all of the fire stations in Port Hope due to the centralization of management and administration, functional coherence, interdependence between stations, common source of work, economic advantages of one comprehensive unit and potential adverse effects to the parties and public that could arise if fragmentation occurred – Vote ordered

CORPORATION OF THE MUNICIPALITY OF PORT HOPE, THE; RE CHRISTIAN LABOUR ASSOCIATION OF CANADA, File No. 4144-04-R; Dated May 18, 2005; Panel: Peter F. Chauvin, Vice-Chair (10 pages)

Related Employer – The Operating Engineers filed an application under s.1(4) of the Act to have the Board declare that the respondent (EMS) was related to its subsidiary environmental construction companies – The Board found that EMS performed distinct activities from its subsidiaries and played no role in determining the working conditions, hiring, wages or daily working lives of the subsidiary companies' employees – The Board held that a declaration under s.1(4) was not necessary to preserve or protect any bargaining rights that the union may acquire because EMS performed an entirely different function than its subsidiary companies – The Board held that a s.1(4) application would be successful if a party could demonstrate that bargaining rights would likely be eroded absent a declaration – Application dismissed

ENVIRONMENTAL MANAGEMENT SOLUTIONS INC.; 345388 ONTARIO LIMITED O/A CANNINGTON EXCAVATING 1989 INC.; 1291694 ONTARIO INC. O/A CANNINGTON ; K-LOR CONTRACTOR SERVICES LTD. AND ROM NEG CONSTRUCTION INC., RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; Board File No. 2218-04-R; Dated May 19, 2005; Panel: Norm Jesin, Vice-Chair (5 pages)

Employment Standards – The employer sought a review of an officer's order for unpaid wages – When the employee's work week was permanently reduced from five days to four (with a 20% reduction in pay) and she was subsequently required to work on the fifth day, the officer found the employee was entitled to an extra day's wages – The employer argued that the employee was called in for an emergency situation and that this was an implied condition of her employment – The Board found that when the work week was shortened with a concomitant diminution in salary, the parties appeared to have recognized that a whole day's work was worth a whole day's pay – Emergencies would not ordinarily require the employee to work a whole day – Application dismissed

GRAYKER CORPORATION, OPERATING AS CADET CLEANERS, RE EUDA EDWARDS AND DIRECTOR OF EMPLOYMENT STANDARDS; Board File No. 2126-04-ES; Dated May 16, 2005; Panel: Ian Anderson, Vice-Chair (4 pages)

***Prima Facie* Motion – Unfair Labour Practice –** The applicant Carpenters alleged that Ledcor and CLAC either had no voluntary recognition agreement or that they had entered into a collective agreement in order to defeat the rights of employees or other unions under the Act – The Board had earlier dismissed a related application to terminate bargaining rights brought by the Carpenters – Ledcor and CLAC both sought to have the unfair labour practice dismissed because it was moot or the applicants had failed to plead a *prima facie* violation of the Act – The Board held the applicant had pled no facts which would lead

the Board to conclude any anti-union animus on the part of Ledcor – Further, the Board found that a voluntary recognition agreement entered into without employee support was not *per se* unlawful and did not constitute employer support – Finally, the Board found that the Carpenters' challenge to the voluntary recognition agreement was untimely and any challenge to the collective agreement could be dealt with in the parallel application for certification filed by the Carpenters – Application dismissed

LEDCOR INDUSTRIES LTD., RE CHRISTIAN LABOUR ASSOCIATION OF CANADA, RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; Board File No. 1970-04-U; Dated May 4, 2005; Panel: Susan Serena, Vice-Chair, and Board Members George McMenemy and John Tomlinson (6 pages)

Evidence – Practice and Procedure – Related Employer – Sale of Business – In this s. 69/1(4) application, the parties argued a preliminary motion of who should be required to call their evidence first – The responding parties, having conceded that they carry on associated or related businesses, argued that they had satisfied the evidentiary onus of s. 1(5) and 69(13) – The Board ruled that an admission of a legal conclusion was not sufficient to relieve the responding parties of their burden under the Act – The legal onus for the application remains with the applicant but the obligation to establish the facts that each party relies on rests with that party – Matter referred to Registrar for further hearing dates

NORTH BAY DRYWALL & ACOUSTIC AND/OR NORTHERN SPECIALTIES AND/OR NORTHERN SPECIALTY COATINGS & FINISHERS, RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486; Board File No. 1388-04-R; Dated May 17, 2005; Panel: David A. McKee (3 pages)

Bargaining Rights – Construction Industry - Related Employer – Sale of Business – The Operating Engineers sought a declaration that Hydro One and Ontario Power Generation as well as a number of subsidiary companies were successors or related to Ontario Hydro – The applicants also sought a determination of the extent of their bargaining rights, that is, whether they were restricted to the electrical power systems sector or extended to other sectors of the construction industry, including the industrial, commercial and institutional sector – The Board provided a comprehensive history of the bargaining relationship of these parties, dating back to their original 1950 certificates, through to circumstances in 1978 when province-wide bargaining was instituted – It looked at successive collective agreements, the work the Operating Engineers do with the employer, and concluded that the collective agreement between the parties is entirely within the electrical power systems sector – The agreement, however, covers all work on Ontario Hydro property for the bulk power system, including structures such as administrative buildings, sewer and watermains, pipelines, dams, earthworks, landscaping and roads – The Board held, therefore, that the existing collective agreements did not create any bargaining rights in the ICI sector – Matter to proceed

ONTARIO HYDRO, ONTARIO POWER GENERATION INC., AND THOSE SUBSIDIARY DERIVATIVE CORPORATIONS LISTED ON APPENDIX "A" TO THE APPLICATION; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; Board File No. 0188-03-R; Dated May 6, 2005; Panel: David A. McKee, Vice-Chair, and Board Members John Tomlinson and Alan Haward (25 pages)

Certification – Construction Industry – *Prima Facie* Motion – The applicants are seeking to displace their own parent international unions – The responding parties brought a motion to have the applications dismissed, arguing that the applicants already had bargaining rights for these employees pursuant to the EPSCA collective agreement – The responding parties argued further that the applicants cannot use membership support from employees for whom they already hold bargaining rights to expand the scope of the bargaining unit – The Board ruled that the source of membership support is not a factor affecting the applicants' ability to proceed – If an application for certification is filed in a timely manner, the Board has no authority to dismiss the application simply because the union already holds bargaining rights for the same employees – Motion dismissed, matters continue

ONTARIO POWER GENERATION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, RE ELECTRICAL POWER SYSTEMS

CONSTRUCTION ASSOCIATION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, INTERNATIONAL UNION OF OPERATING ENGINEERS, POWER WORKERS' UNION CANADIAN UNION OF PUBLIC EMPLOYEES, C.L.C. LOCAL 1000 RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; Board File Nos. 3448-03-R, 3450-03-R, 3457-03-R, 3502-03-R, 0094-04-R, 0096-04-R, 0112-04-R, 0113-04-R, 0114-04-R, 0506-04-R, 0507-04-R, 0527-04-R, 0529-04-R, 0531-04-R, 0532-04-R, 0533-04-R, 0534-04-R, 0561-04-R, 0917-04-R, 0925-04-R, 0926-04-R, 1026-04-R, 1045-04-R, 1534-04-R, 1688-04-R; Dated May 30, 2005; Panel: Harry Freedman, Vice-Chair, and Board Members G. Pickell and A. Haward (6 pages)

Certification – Unfair Labour Practice – The applicant applied for certification and, having lost a representation vote, brought an unfair labour practice complaint seeking to have the Board order a second representation vote – The applicant relied on three aspects of the responding party's conduct: its circulation of printed material relating to the organizing campaign; its discipline of organizers; and its facilitation of a plant-wide meeting prior to the original representation vote – The Board found no threats in the employer's campaign literature, nor any material misrepresentations respecting the certification process or the consequences of certification – The Board rejected the allegation of discipline because there was no evidence that any of the employees involved were aware of any cautions or warnings being meted out by the employer – Finally, the Board found that the meeting was called and organized by an employee committee that had been in existence in the workplace for the past two years and comments made by employees at the meeting against the union could not be attributed to management – Both applications dismissed

PATTISON SIGN GROUP; RE TEAMSTERS LOCAL UNION 938; Board File Nos. 3621-03-R, 3869-03-U; Dated May 19, 2005; Panel: Mary Anne McKellar, Vice-Chair, and Board Members R. O'Connor and H. Peacock (13 pages)

Health and Safety – The applicant sought to have the Board rescind two orders directing the employer to amend the airflow of all operating diesel equipment in order to comply with section 183.1(3) of the *Regulation for Mines and Mining Plants* - The dispute centred on the interpretation of the term "operating" in the regulation - The employer relied on the Ontario Court of Justice (Provincial Division) decision in *R. v. Minnova Inc.* to support its position that "idling" was not "operating" - The inspector asserted that "operating" must include "idling" when the fundamental purpose of the *Act* is to protect workers' health and safety – The Board held that it was not bound by the decision in *Minnova* and ruled that "operating" should be interpreted in accordance with the purpose of the *Act* – Appeal dismissed

PLACER DOME CANADA, MUSSELWHITE MINE, RE EMPLOYEES OF PLACER DOME CANADA, MUSSELWHITE MINE; ROBERT BERTRAND, INSPECTOR; Board File No. 2971-03-HS; Dated May 13, 2005, Panel: Jack J. Slaughter, Vice-Chair (7 pages)

Employment Standards – The applicant sought review of an officer's order finding that he was a director of a defunct company and liable for wages and vacation pay to former employees – Corporate documents revealed that the applicant was a director and secretary of the company –The applicant argued that he was unaware of the documentation, which had been filed with the Ministry of Consumer and Business Services by a former associate, without the applicant's knowledge – The Board found that the evidence of the operation of the company, the applicant's (and his father's) investment in it, and the applicant's failure to call the former associate did not rebut the presumption of directorship created by s. 262(3) of the Ontario *Business Corporations Act* – Application dismissed

SCHOCHET JEFF; RE PATO BELA, BOGDAN BILANICZ, RICHARD R. HARTWICK, TY NGUYEN-THI, ALEXANDER F. PALMER, GAIL PEREIRA, RASIAH RAJAKULEPTHIRAN, INEZ RODRIGUEZ, VICTORI VT TORRES, ALEX VALENICA, THU-HUONG VOUNG, REBECCA RUI Y XIE, SAHUL HAMEED MOHAMED JAINOOS, JERZY KORZEPA, WILLIAM NORMAND SAWYER AND DIRECTOR OF EMPLOYMENT STANDARDS; Board File No. 1090-04-ES; Dated May 25, 2005, Panel: Ian Anderson, Vice-Chair (5 pages)

Employment Standards – The applicant employee sought a fresh determination of his

entitlement to termination and severance pay (denied in 1993) following a recent Ontario Court of Appeal decision striking down the original provision which disentitled him (*Ontario Nurses' Association v. Mt. Sinai Hospital*, unreported, May 4, 2005) – The Director of Employment Standards denied the employee's request to have his case re-litigated – The Board invoked the principle of *res judicata* and dismissed the application – Application dismissed

VICENTE ANTONIO; RE CAMBRIDGE BRASS AND DIRECTOR OF EMPLOYMENT STANDARDS; Board File No. 3026-04-ES; Dated May 18, 2005, Panel: Marilyn Silverman, Vice-Chair (3 pages)

Project Agreement – Timeliness – Unfair Labour Practice – The applicant complained that the responding party's decision to contract off-site sheet metal fabrication to a contractor, not in a contractual relationship with the applicant, violated s. 163.1(14) of the Act – In an earlier decision, the Board ruled that s. 163.1(14) is capable of being violated, but at the same time dismissed a construction industry grievance involving these parties, because the responding party is not bound to the Sheet Metal Workers provincial ICI agreement – The Board dismissed this complaint for undue, unexplained delay because it was filed seventeen months after the alleged violation – On the merits, the application was also dismissed because the language of the project agreement stated explicitly that it related to on-site work only – Application dismissed

WEYERHAEUSER ENGINEERING SERVICES, RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 397; Board File No. 0905-03-U; Dated May 17, 2005; Panel: Jack J. Slaughter, Vice-Chair (9 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
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	Dismissed – Reasons to Follow
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
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	Dismissed for Delay – May 6/05
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