ISSN 1195-0226

Ontario Labour Relations Board

HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

August 2007

Lee Shouldice

The Board is pleased to announce the appointment of Lee Shouldice as a full-time Vice-Chair. Lee was called to the bar of Ontario in 1987 and served as a Vice-Chair from 1993 to 1998. He returns to the Board from private practice and takes up his new posting in August 2007.

Public Service of Ontario Act, 2006

The Board has developed new forms for applications filed under the new *Public Service of Ontario Act, 2006* which is to be proclaimed on August 20, 2007. The forms, relating to the reprisal provisions of the PSOA, will be available on the Board's website.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July of this year. These decisions will appear in the July/August 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 – Constitutional Law – Construction Industry – In the context of an application for certification under the construction industry provisions, the employer, Atomic Energy of Canada Limited (AECL), claimed it was a federal Crown agent and therefore the *Canada Labour Code* and not the Act was applicable – The Board held that the reference to "the Crown" in s. 4 of the Act was sufficiently broad to include federal Crown agents, thus both the Code and the Act could apply – The Board held that there were inconsistencies between the two statutes "in the nature of the body to whom the application must be made… who may issue the certificate [and] the manner in which entitlement to be certified is to be demonstrated, and the consequences that flow from any certification" – The Board then applied the doctrine of paramountcy, holding that, to the extent of these inconsistencies, the federal Code was paramount and would apply, provided that AECL was actually a Crown agent – The Board found that all of the carpenters' work related to refurbishing CANDU reactors and therefore fell within the purposes of the AECL as delegated by statute – The Board concluded that AECL was therefore a Crown agent governed by the Code, therefore paramountcy applied, rendering s. 4 of the Act inoperative for the purposes of certification – Application dismissed

ATOMIC ENERGY OF CANADA LTD.; RE CJA, LOCAL 2222; File No. 2975-06-R; Dated July 19, 2007; Panel: David A. McKee (10 pages)

Employment Standards – Statutory Holiday – The employer sought a review of an order to comply with the holiday pay provisions of the *Employment Standards Act, 2000* – The employer argued that the loss of a substitute day off for public holidays which fall on a day that is not ordinarily a working day for the employee was compensated for in this case by greater rights or benefits in the employment contract – The Board agreed that the employer's plan for public holidays provided a greater right or benefit, as contemplated by s. 5(2), and therefore it did not need to determine whether the plan was consistent with the Act – The Board noted that the claimant received 10 public holidays as opposed

to the 8 provided for under the Act – The Board noted in addition that, for a number of those holidays, the claimant received 12 hours of holiday pay, as opposed to the 8.4 hours he would be entitled to under the Act – It was uncontested that the employer's maintenance operation was a continuous operation, and therefore the employer could require employees to work on any public holiday that would ordinarily be a working day under s. 28 of the Act – The employer in this case, however, gave its maintenance employees the choice of whether or not to work on a public holiday that was ordinarily a working day – The Board held that when both the employee's monetary entitlement and time off were considered, the employer's plan provided a greater right or benefit, and the choice to work public holidays in particular offset any lost holiday time – Appeal allowed

BOWATER CANADIAN FOREST PRODUCTS INC.; RE WAYNE LEARNING AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3913-06-ES; Dated July 5, 2007; Panel: Tanja Wacyk (9 pages)

Certification – Practice and Procedure – Unfair Labour Practice – CLAC applied to certify the employees of the employer pursuant to s. 128.1 – Six days later the Labourers intervened in the CLAC application, filed a certification application under s. 8, as well as an unfair labour practice against CLAC and the employer – The Board found there was nothing objectionable in CLAC filing a certification that was in part a displacement and in part a fresh application for a group of unrepresented employees – Secondly, since CLAC was unaware of the Labourers' bargaining rights in the ICI sector, the Board held CLAC was not obliged to identify the other union in its application – The Board then considered s. 111(3) of the Act and the factors relevant to its exercise of discretion in applying that section, including: the ability to ascertain the true wishes of the employees; whether there are overlapping bargaining units; the potential complexities of the vote arrangements; the significance of the application date in the construction industry; the desire to avoid protracted litigation; the timing of the second application; the promotion of harmonious labour relations; and the existence of the outstanding unfair labour practice complaint – The Board found that since the Labourers filed their intervention in the CLAC application on the same day as their own certification (and the intervention was found to be timely by a different panel of the Board), and since no significant steps had been taken in the card-based certification at that point, it would exercise its discretion to treat the applications as having been filed on the same day – Matter continues

CONCRETE SYSTEMS INC.; RE CONSTRUCTION WORKERS LOCAL 53, AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA; RE LIUNA, LOCAL 1089; File Nos. 3737-06-R; 3793-06-R; 3794-06-U; Dated July 17, 2007; Panel: Jack J. Slaughter (8 pages)

Build-Up – Certification – Termination – Voluntary Recognition Agreement – In an application for certification filed by CUPW, the intervenor, LIUNA Local 183, claimed that the application was barred because it had a VRA with the responding employer – In reply, CUPW requested that the Board declare, pursuant to s. 66 of the Act, that Local 183 was not entitled to represent the employees of the bargaining unit at the time it entered into the VRA with the employer – CUPW further submitted that the Board should apply the principle of "build up" in making its determination under s. 66, as only 41% of the workforce was employed by Distinction at the time it entered into the VRA with Local 183 – The Board held that it could only consider whether Local 183 was entitled to represent the employees in the bargaining unit "at the time the agreement was entered into," and therefore build-up had no application under s. 66 – The Board further held that, in the absence of a finding of improper conduct, it generally does not set aside agreements reached by employers and their incumbent unions – Rather, "the Board preserves the labour relations regime and stability that has been established by the parties [as t]his is consistent with the stated purposes of the Act" – Matter continues

DISTINCTION SERVICE PLUS INC.; RE THE CANADIAN UNION OF POSTAL WORKERS; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1856-06-R; Dated July 6, 2007; Panel: Peter F. Chauvin (8 pages)

***Companies' Creditors Agreement Act* – Certification – Stay –** Two days after the ballots were counted in this application and more than fifty percent were cast in favour of the union, the Ontario Superior Court of Justice issued an order staying all proceedings in respect of the responding party, Dovecorp – The applicant argued that the issuance of the certificate was merely an administrative function reflecting the results reached prior to the stay – The Board held that the breadth of the court order precluded the Board from taking any steps without leave of the court – Application adjourned *sine die*

DOVECORP ENTERPRISES INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; File Nos. 0703-07-U; 0931-07-R; Dated July 20, 2007; Panel: Tanja Wacyk (3 pages)

Certification – Certification Where Act Contravened – Construction Industry – Unfair Labour Practice – The union sought automatic certification under s. 11 of the Act, alleging that the owners of the respondent company had contravened ss. 70, 72 and 76 – The union alleged that a company owner had phoned and physically threatened the outside union organizer, and a "captive audience" meeting was held during which physical threats against union organizers and threats to job security were made – The Board held that threatening a person who acts on behalf of a union with physical violence was a violation of both ss. 70 and 76 –The Board also held that even though no employee was directly threatened with violence at the meeting, the offer of money by one of the owners to anyone who would punch a union organizer was a suggestion of violence that necessarily has the effect of creating a climate of intimidation – The Board held that that comment was a violation of ss. 70 and 72(c) – The Board held that statements made by the owners at the meeting that the company may lose customers, that the employees would have to drive their own vehicles (rather than company vehicles) at their own expense if they had to work for another employer, and the general statement that there could be job cuts, reductions and lost hours if the union won all constituted threats to job security and amounted to a violation of ss. 70, 72(c) and 76 of the Act – The physical threats and threats to job security created an atmosphere in which employees were unable to express their true wishes "free of the shadow of repercussions by the employer" – Automatic certification granted – Certificate Issued

EAST ELGIN CONCRETE FORMING LIMITED; RE LIUNA, LOCAL 1059; File Nos. 2254-06-R; 2278-06-U; Dated July 18, 2007; Panel: Marilyn Silverman (14 pages)

Certification – Construction Industry – Reconsideration – Trade Union Status – The Carpenters sought reconsideration of a Board decision granting the Sheet Metal Workers trade union status (unreported Board decision, June 20, 2007) in eight certification applications – The Carpenters argued that the Board denied them procedural fairness by not allowing them to adduce evidence relating to an earlier finding of status involving different employees and employers – The Board held that it acted properly in refusing the Carpenters the opportunity to lead evidence on the earlier files: first, the Board assumed all of the material facts and particulars pled concerning the earlier applications to be true; secondly, the parties in those matters were not before the Board; and finally, the Sheet Metal Workers had agreed not to rely on those earlier cases, but to establish its trade union status *de novo* – The Board further held that if the Carpenters wished to pursue their allegations of impropriety relating to the earlier files, there were processes available to them for doing so under the Act; the Board specifically did not rule on what effect or consequences any findings of fault in those unfair labour practices might have on the eight certification applications – Matter continues

EASTERN EAVESTROUGHING LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE CARPENTERS & ALLIED WORKERS LOCAL 27, CJA; File Nos. 3394-06-R; 3399-06-R; 3418-06-R; 3528-06-R; 3545-06-R; 3641-06-R; 3797-06-R; 4039-06-R; Dated July 13, 2007; Panel: Mark J. Lewis, John Tomlinson, Richard Baxter (5 pages)

Contempt – Consent to Prosecute – Order for Productions – Practice and Procedure – Related Employer – Sale of a Business – In the context of a s. 69/1(4) application, the Board issued a Confidentiality Order pertaining to documents produced by the responding parties – The responding parties subsequently alleged that the union breached the Confidentiality Order – The union argued the Board had no jurisdiction to consider such a breach – Dealing only with jurisdiction, the Board found that the issue of the breach and enforcement of Orders is one of mixed fact and law and, as such, falls within its jurisdiction – The Board noted that a part of its practice and procedure includes the power to compel the production of documents and to grant Orders protecting the confidentiality of such documents – The Board further noted that if it could not make determinations regarding a possible breach of a Confidentiality Order, such orders would be rendered meaningless – The Board rejected the union's contention that the responding parties had not provided sufficient particulars of their allegations, and that the Board's consideration of the issue would result in undue delay and a waste of the Board's time – The Board found that the fact that it may state a case to the Divisional Court for contempt or may grant a consent to prosecute merely confirms the Board's jurisdiction to consider the issue – Matter continues

KIMBERLY-CLARK CORPORATION AND KIMBERLY-CLARK INC.; NEENAH PAPER, INC. AND NEENAH PAPER COMPANY OF CANADA; BUCHANAN FOREST PRODUCTS LTD., TERRACE BAY PULP INC. AND EAGLE LOGGING INC.; RE UNITED STEELWORKERS LOCAL 1-2693; File No. 3769-05-R; Dated July 6, 2007; Panel: Peter F. Chauvin (9 pages)

Certification – Construction Industry – Reconsideration – Unfair Labour Practice – The Board was asked to reconsider its dismissal of a certification application; the dismissal was based on the Board's finding that a particular individual was performing bargaining unit work on the application date and was therefore included in the unit, reducing the applicant's requisite support for card-based certification; in a vote, conducted earlier on agreement of the parties, the union had lost – At the reconsideration hearing, the applicant adduced credible evidence that the impugned employee's time card had been altered to show he performed bargaining unit work and not office work, and the applicant only learned of the tampering after the dismissal of the application for certification – The Board found the employer violated s. 70 of the Act –Reconsideration granted, dismissal revoked, certificate issued

KOOL FAB MECHANICAL INC.; RE ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; File Nos. 2611-05-R; 2106-06-U; 2497-06-U; 2826-06-U; Dated July 18, 2007; Panel: Marilyn Silverman (10 pages)

Bar – Certification – Construction Industry – In this application for certification, the responding party argued that s. 160(3) operated to create a mandatory bar in all construction industry cases (there had been a dismissal under s. 8.1(5)7 of an earlier application) – The Board relied on its prior jurisprudence that found that, following the 2000 amendments to the LRA, construction applications for certification are to be dealt with under ss. 7 to 10 of the Act – The Board held that ss. 158 to 160 supplement those general certification provisions where necessary – This meant that the bar in s. 10(3), not the bar in s. 160(3), applies to applications dismissed under s. 8.1 – The Board rejected the argument that s. 160(3) creates a mandatory bar in all construction industry cases – The Board noted that, even though there are no dismissal provisions in s. 160, s. 160(3) is not meaningless, as every clause in a statute must be given meaning – The Board held that s. 160(3) extends the bar in s. 10(3) to the relevant employee bargaining agency and affiliated bargaining agents in the ICI sector – Matter continues

MONDIALE DEVELOPMENT LTD. AND/OR PINNACLE INTERNATIONAL; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1871-05-R; Dated July 11, 2007; Panel: Jack J. Slaughter (10 pages)

Certification – Construction Industry – Practice and Procedure – Status – Timeliness – The respondent employer sought to add an employee to the bargaining unit two weeks after the application for certification was first filed – The Board held that the Divisional Court's ruling in *Maystar* [2007] OLRB Rep. March/April 459 regarding the Board's discretion to consider late evidence filed by a responding party applies to these circumstances – The Board noted that the ability of a trade union to determine what tasks an employee performed on the date of application "diminishes by the hour," but that prejudice to the union as a result of late filing of information will not result in every case – The Board held that the two-week delay in notifying the Board coupled with a failure to notify the union earlier would result in prejudice to the union if the employee was included on the list – The Board rejected the argument that the employer could act as a proxy for the employee holding that there was an adequate process for the employee to assert his right to participate – The Board also held that it is not for the employer to raise the rights and interests of an employee, particularly where the employee himself has not sought to assert that he is an employee in the bargaining unit – The Board denied the request of the respondent to add the employee to the list – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ; File No. 3648-06-R; Dated July 23, 2007; Panel: Caroline Rowan (7 pages)

Employment Standards – Health and Safety – Reprisal – Work Refusal – The employee alleged he was dismissed because he had raised concerns with his employer regarding overtime pay and the safety of a van used in the course of his employment, contrary to s. 74 of the ESA and s. 50 of the OHSA, respectively – The Board held that there was no requirement under s. 50 of the OHSA for the employee to first comply with the Act *and then* seek its enforcement; rather, it is sufficient that the worker acted in compliance with the Act *or* sought its enforcement *or* gave evidence in a proceeding in relation to the enforcement of the Act – The Board held that there was no evidentiary basis for concluding that

the employee had raised the subject of the safety of the van with his employer – The evidence revealed that the employee and employer engaged in an argument regarding the effect a diesel leak in the van would have on the employee's license, and this led to his discharge – No issue of overtime was raised during the argument – Application for review of ESO's decision not to issue an order finding a breach of s. 74 of the ESA dismissed – Employer found not to be in breach of s. 50(1) of the OHSA – Matter referred to Field Services to resolve Board's exercise of discretion under s. 50(7) of the OHSA – Matter continues

TRI-GREEN CONSTRUCTION INC.; RE DARRYL HICKEY; File Nos. 2570-05-OH; 3540-05-ES; Dated July 17, 2007; Panel: Ian Anderson (10 pages)

Health and Safety – The Steelworkers appealed the failure of the Ministry of Labour to conduct a thorough and complete investigation into whether or not a multi-site joint health and safety committee was in operation without the workplace parties' consent – The Board held that it had no jurisdiction to make orders against inspectors (to conduct an investigation), and found there was no requirement in the Act that workers or trade unions consent to the form of the joint health and safety committee in the workplace – Application dismissed

UNIVERSITY OF GUELPH AND KELLIE HARRISON, INSPECTOR; RE UNITED STEELWORKERS LOCAL 4120; File No. 0977-07-HS; Dated July 18, 2007; Panel: Mary Ellen Cummings (2 pages)

Court Proceedings

Judicial Review – The Divisional Court issued a costs decision following the quashing of the Board's decision in this judicial review application - The applicant sought a costs award of $10,000 against the union and the Board – The court held that it does not assess costs, it fixes them, and in fixing costs, the key question the court asks is "what is the total for fees and disbursements that would be a fair and reasonable amount to be paid by the unsuccessful parties in the particular circumstances of this case?" – The court noted that labour relations cases in Divisional Court are generally held to low costs, possibly reflecting the absence of cost orders in labour arbitrations – The court saw no reason to move away from the traditional $3,000-5,000 range normally awarded in these applications – The court awarded $4,000 to the applicant, but did not require the Board to bear any of these costs, as it did nothing but make submissions as to the standard of review in its normal fashion

MAYSTAR GENERAL CONTRACTORS INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1819 AND THE ONTARIO LABOUR RELATIONS BOARD; File No. 0812-06-R (Court File No. 481/06) Dated July 26, 2007; Panel: Cunningham, Lane, Smith JJ. (3 pages)

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
Eastern Eavestroughing v. Sheet Metal Workers', et al Divisional Court No. 359/07	3394-06-R; 3399-06-R; 3418-06-R; 3528-06-R; 3545-06-R; 3641-06-R; 3797-06-R; 4039-06-R	Pending
Dr. Oliver Bajor v. OLRB Divisional Court No. 258/07	0353-06-ES	Pending
1257707 Ont. Ltd. o/a Oakville Honda v. Creyos Batchelor & OLRB Divisional Court No. 152/07	0784-06-ES	Pending
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	December 10, 2007
Dana Horochowski v. OECTA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	Pending
Hurley Corporation v. OLRB; SEIU L. 2.on Divisional Court No. 23/07	2915-06-R	Pending
Comstock Canada et al v. United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 Divisional Court No. 522/06	2558-03-JD	November 22, 2007
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Johnson Controls Ltd. v. Brookfield Lepage Divisional Court No. 406/06	1634-04-R	Adjourned – sine die
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	March 21, 2007 (reserved)
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	June 4, 2007 (reserved)
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Pending
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	Dismissed – June 22/07; seeking leave to C.A.
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04 Court of Appeal No. C-46210	1271-03-U; 1336-03-M; 1414-03-M	Court of Appeal – Oct. 9, 10, 11, 2007
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Sept. 17/07
Maystar General Contractors Inc. v. IUPAT, Local 1819 Divisional Court No. 481/06	0812-06-R	Allowed - Mar. 20/07; Leave to C.A. granted July 26/07