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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 June 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.

Certification – Certification where Act Contravened – Construction Industry – Remedies – Representation Vote – Unfair Labour Practice – The union brought an application for certification and remedial certification under s. 11, alleging that the employer had contravened the Act by terminating a union organizer, thereby preventing the union from being able to demonstrate it had more than 40% membership support – The employer, solely owned by Normoyle, had four employees during the relevant time period – McCarthy, the inside union organizer, was terminated nine days after being hired, and the day after Normoyle discovered there was a union organizing drive – The Board did not accept that McCarthy was fired for performance deficiencies, for being slow in his work and for being late – The Board noted that the employer did not warn or reprimand McCarthy for these matters at the time they occurred, nor was he allowed any opportunity to change – The Board found the totality of the performance issues were of no consequence to Normoyle at the time they occurred because he did not act on them – The Board further found that the timing of the termination, one day after Normoyle discovered that McCarthy was involved in the union organizing the work place, was significant in light of the lack of employer-demonstrated reasons for termination – The Board found that McCarthy was fired because he was behind the union organizing drive and this was a breach of the Act – The Board then turned to the appropriate remedy under s. 11 recognizing that it can only certify without a representation vote where "no other remedy would be sufficient to counter the effects of the contravention" – The Board found that the employees could not freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity – The employer's actions served two purposes: stopping the union organizer from accessing employees and sending a message to employees that support for the union meant job loss – The Board found that a representation vote with ancillary relief would be insufficient to counter this effect – The union's application under s. 11 was granted and the union was certified – Application granted

1443760 ONTARIO INC. OPERATING AS SWING STAGE EQUIPMENT RENTALS OTTAWA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93; File Nos. 2098-06-R; 2099-06-U; Dated June 15, 2007; Panel: Marilyn Silverman (13 pages)

Bar – Certification – Construction Industry – The union filed a card-based certification application on the same day that it advised the Board it wished to withdraw an earlier application, where the Board had found, after hearing status dispute evidence, that a representation vote was required due to membership support being between 40 and 55 percent – The employer requested that the Board impose a discretionary bar pursuant to s. 7(9) – The Board found that the stage of the proceeding when the union seeks leave of the Board to withdraw its application is

significant – Here the union chose to withdraw its application after realizing that it did not have sufficient support for certification without a vote – The Board considered this a far different circumstance than when a union withdraws early, after seeing the employer's response and realizing it has insufficient support – The Board found, after the parties' prolonged litigation, that was not fair to the employer, having successfully resisted some of the union's positions, to have to start all over again – The employer and employees were entitled to a period of repose – The Board exercised its discretion and imposed a six month bar – Application dismissed

K.J. BEAMISH CONSTRUCTION CO. LTD.; RE IUOE, LOCAL 793; File Nos. 1542-05-R; 2724-06-R; Dated June 15, 2007; Panel: Marilyn Silverman (7 pages)

Collective Bargaining – Construction Industry – Duty to Bargain in Good Faith – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL breached s. 17 of the Act – The applicants allege that LEBA and the two other constituent members, by entering into agreements extending the scope of their appendices and subcontracting provisions, have forced a recognition issue to impasse, since PEBAL cannot adopt an agreement entered into by some members that has a direct negative impact on its other members – The Board found that just as there is no duty to bargain in good faith owed to employees, there is no duty owed to the constituent members of PEBAL – The Board further noted that while it is charged with determining the applications or complaints that are filed with it, the Board must be satisfied the applicants do not just have an interest in the matter, but have the legal right to proceed with the complaint – Here the Board found since there is no duty on LEBA to bargain in good faith with the constituent members of PEBAL, the applicants do not have the legal right to assert that LEBA violated the duty to bargain in good faith owed to PEBAL – Finally the Board characterized this matter as one of a complaint about the manner in which two of the five constituent members of PEBAL have dealt with the other three members (and how LEBA has taken advantage of this schism), and not as one encompassed by s. 17 of the Act – Application dismissed

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO; File No. 0567-07-U; Dated June 5, 2007; Panel: Harry Freedman (6 pages)

Collective Bargaining – Construction Industry – Interference with employers' organization – Intervenors – Parties – Unfair Labour Practice – Three of five constituent member associations of PEBAL filed a complaint alleging the LEBA together with the other two constituent members of PEBAL interfered in the administration of the employers' organization contrary to s. 71 of the Act – The Board ruled on four preliminary motions raised by the responding parties – First, the Board found that the members of the employers' organization had a direct legal interest in having their organization operate without interference by a trade union and accordingly had standing – Second, the Board declined to determine whether the applicants had pled a *prima facie* case and dismissed the responding parties' motion to dismiss – Third the Board declined to exercise its discretion to refuse to entertain the complaint – Finally, the Board found merit in the responding parties' submissions seeking to defer the matter pending the outcome of an Industrial Inquiry Commission, given that through its mandate the Commission would provide a much better forum for discussing the parties' differences – Adjourned pending release of Commission's report

ONTARIO MASONRY CONTRACTORS ASSOCIATION; RE CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF ONTARIO; RE SEALANT AND WATERPROOFING ASSOCIATION; RE INDUSTRIAL CONTRACTORS ASSOCIATION OF CANADA; RE CONCRETE FLOOR CONTRACTORS ASSOCIATION OF ONTARIO; File No. 0567-07-U; Dated June 14, 2007; Panel: Harry Freedman (6 pages)

***Prima Facie* Case – Related Employer – Sale of Business –** The union sought a Board order consolidating its bargaining units of editorial employees as a result of the corporate restructuring and centralization initiatives undertaken by Sun Media's three newspapers – The responding parties asked the Board to dismiss the application under rule 39 – The Board found the staffing of non-union jobs in the Centres of Excellence with former bargaining unit employees did not constitute the sale of a business or part thereof – The Board then decided, assuming the responding parties were related employers, that there was no possibility it

would grant the extraordinary remedy of bargaining unit consolidation for the following reasons: first, the consolidation would create a bargaining unit covering three municipalities, which runs contrary to the Board's usual practice; second, the union acknowledged the sharing of editorial content in the past and yet it has been content to organize on a newspaper by newspaper basis; third, the union can challenge the restructuring through grievances, an unfair labour practice complaint or in collective bargaining – Sale of business dismissed; declarations made

SUN MEDIA CORPORATION; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD; File No. 2983-06-R; Dated June 26, 2007; Panel: Patrick Kelly (10 pages)

Collective Agreement – Duty of Fair Representaiton – Trade Union – The six applicants, members of the respondent trade union, CHCW, had filed lay off grievances that were scheduled for arbitration – During a displacement campaign by OPSEU, the members were advised that their grievances would be withdrawn should the members vote for OPSEU – OPSEU was successful and, prior to OPSEU providing a letter to CHCW that OPSEU would act as agent and incur all costs for the grievances, CHCW withdrew the grievances – The Board first found that CHCW's campaign statement--that it would withdraw the grievances--was not a breach of s. 76, since its actions were a reasonable interpretation of its obligations on the loss of representation rights – The Board also found that CHCW's withdrawal of the grievances, prior to hearing from OPSEU, did not breach s. 74 since nothing required a defeated incumbent union to "keep alive" outstanding grievances against the possibility that the incoming union might seek its permission to act as agent with proper cost protection – Accordingly the Board found, in the absence of any obligation by OPSEU to request agency for carriage of the grievances or any reasonable expectation that it would do so, that the withdrawal of the grievances accorded with CHCW's institutional interests and were not a breach of the Act – Finally, once CHCW received OPSEU's letter, the Board found CHCW's failure to take any action to retract its withdrawal could not be a breach of its duty since it could no longer unilaterally accomplish this – Application dismissed

THE CORPORATION OF THE COUNTY OF GREY OPERATING AS GREY GABLES COUNTY HOME FOR THE AGED; RE PEARL LONG ET AL; RE CANADIAN HEALTH CARE WORKERS UNION; File No. 1163-06-U; Dated June 11, 2007; Panel: Corinne F. Murray (7 pages)

Employee – Interference with Trade Union – Remedies – Unfair Labour Practice – The collective agreement between the University and YUSA included eligibility to participate in a pension plan and post-retirement benefits – The University, arguing retirees were not employees, refused to provide YUSA with the names and addresses of persons who had retired from the University and had been employed in the bargaining unit represented by YUSA immediately prior to their retirement – The Board did not find it necessary to determine whether retirees were "employees" for at least some purposes of the Act – The Board found as long as it was arguable that YUSA had an obligation or the right to pursue a grievance respecting the continued provision of benefits to retirees in accordance with the collective agreement provisions, the denial of information to it amounted to an interference with its administration, contrary to section 70 – Declaration and direction that information be provided

YORK UNIVERSITY; RE YORK UNIVERSITY STAFF ASSOCIATION; File No. 0967-06-U; Dated June 4, 2007; Panel: Mary Anne McKellar; Richard O'Connor; D.A. Patterson (8 pages)

Court Proceedings

Alteration of Jurisdiction – Construction Industry – Judicial Review – Natural Justice – Practice and Procedure – The Local alleged that the Board's decision, finding just cause for the International to assume jurisdiction of the Local over a computer centre construction project in Barrie, should be quashed on a number of grounds – The Board, noting that s. 147(5) operated to stay the assumption of the Local's jurisdiction, was concerned that a full hearing might render the result inconsequential and moot, sine the project was near completion held a two day consultation in accordance with Rule 41, as the situation required a speedy resolution – The Board, having acknowledged that there were facts in dispute, determined there was sufficient uncontested material to permit it to reach an appropriate decision – The Board fashioned a specific remedy placing restrictions and conditions on the International's transfer of jurisdiction – On judicial review, the court first found that Rule 41 was not *ultra vires*, since there was no improper delegation of authority by the Chair, nor was the

rule inconsistent with the scheme of the Act – The court found that the rule sets a standard that must be met before a Vice Chair may exercise their discretion in the circumstances of a particular case, and that the Rule is entirely consistent while noting that the Board "operates in a complex, dynamic, and highly fluid environment where expeditious rulings and informal and accessible procedures are often essential to maintaining the delicate balance between the parties' various interests" – Second, the court found that the Board did not deny the Local natural justice by proceeding with a consultation rather than a full hearing, since the core value embraced by the *audi alteram partem* maxim was met by the Board: providing the parties with an opportunity to be heard – The court also found it was not patently unreasonable for the Board to have chosen this procedure, since the Board was given the authority to balance the need for complete natural justice on the one hand against expedition on the other – Third, the court found that the Board did not exceed its jurisdiction by making findings of fact in the absence of any evidence, since there was evidence before it, the sufficiency and weight of which were within its exclusive jurisdiction, permitting it to make its decision – Fourth, the court found that the Board did not deny natural justice by failing to provide adequate reasons, since it provided a sufficiently adequate explanation of the process it engaged in, the conclusions it reached, on what it founded those conclusions and the results of its conclusions – Finally the court found that the Board's decision on the merits was not patently unreasonable: it was a sound and sensible decision in circumstances of acrimony that permitted the appropriate labour relations objective to be achieved, with the least intrusion on the rights of the Local's members – Application dismissed

(Board decision not reported)

IBEW, LOCAL 1739; RE GUILD ELECTRIC LIMITED; RE OLRB; File Nos. 4179-05-U; 4307-05-M (Court File No. 202/06); Dated June 22, 2007; Panel: Lane; Swinton and M.G.J. Quigley JJ. (41 pages)

Duty of Fair Representation – Evidence – Judicial Review – The standard of review with respect to the merits of the Board's decision was patent unreasonableness – The court found that the Board's decision on the merits and in its reconsideration were entirely reasonable: the Board concluded the union could not continue to represent the applicant because of his antagonistic and uncooperative attitude (which was unwarranted); and there was ample evidence on which to base that conclusion – The court also found no denial of procedural fairness in the manner in which the Board proceeded by consultation – A motion to introduce fresh evidence was also dismissed – Application dismissed

(Board decision not reported)

STEPHANE VERREAULT; RE UNITED ASSOCIATION OF JOURNEYPERSONS AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE US AND CANADA, TEAMSTERS LOCAL UNION 419; RE OLRB; File No. 0840-05-U; Dated June 25, 2007; Panel: Lane, Lederman and Swinton 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
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
Stephane Verreault v. UA Local 787 & Teamsters Local 419 Divisional Court No.71/07	0840-05-U	Dismissed – June 25/07
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	Pending
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
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 seeking leave to C.A.