

*H*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 September 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.

Duty of Fair Representation – Duty of Fair Referral – Order for Productions – The employee brought an application alleging a breach of the union's duty of fair representation and its duty of fair referral – The Board held that while the applicant alleged a number of misdeeds on the part of union officials in the course of internal union proceedings involving him, none were alleged in the context of his employment relationship as a bargaining unit employee with an employer bound to the collective agreement – As a result, the Board dismissed the s. 74 application for failure to disclose a *prima facie* case – The Board held that the s. 75 application should proceed because the applicant had been suspended as a union member thereby removing him from the hiring hall list – Since the applicant suggested that his suspension was improperly motivated, an explanation will be required from the union regarding its motivations and thought processes for having suspended the applicant – On this point, as the Board stated in *Danillo Buttazzoni*, [2004] OLRB Rep. May/June 499, it would not entertain arguments about the procedural aspects of, or adherence to, a trade union's constitution by the union's decision-makers who determined the expulsion or suspension of the member – The Board also

ordered that the union provide the applicant with copies of its work assignment records in order to confirm or deny his claim that more junior employees were given work assignments while he was bypassed – Matter continues

DUDLEY WRIGHT; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 873; File Nos. 1512-07-U; 1513-07-U; Dated September 11, 2007; Panel: Patrick Kelly (4 pages)

Bargaining Rights – Termination – During the on-going litigation of this non-construction employer application, the Board was asked to consider whether certain construction work undertaken by the School Board as part of a contract for services funded by Human Resources Development Canada operated to exclude the School Board from the definition of a non-construction employer – The Board found that it was possible for an entity such as the School Board to be a construction employer, although its principal business is not in the construction industry – Further, the HRDC, a branch of the federal government to which the *Labour Relations Act, 1995* specifically does not apply, was an unrelated party for purposes of the present analysis – The Board held that (1) the School Board did perform some construction work as part of its contract with HRDC, but the contract was to provide educational services and the building work was merely incidental to the fulfillment of the terms of the contract; (2) the payment the School Board received from HRDC did not, in the Board's view, constitute compensation from an unrelated person for work in the construction industry; (3) consequently, the limited construction work did not preclude the

School Board from continuing with its assertion that it was a non-construction employer – Matter continues

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE IUPAT, LOCAL 1494; RE LIUNA, LOCAL 625; File Nos. 1776-04-R; 1778-04-R; 1794-04-R; 1796-04-R; 1797-04-R; Dated September 24, 2007; Panel: David A. McKee (13 pages)

Fraud – Standing – Unfair Labour Practice –

The Carpenters complained that the Sheet Metal Workers committed a fraud on the Board that led to the Board issuing certificates to the SMW in respect of units of employees engaged in roofing and siding (in *Proaction Aluminum* and *Tops Roofing*) – The SMW subsequently filed other applications for certification seeking to displace the Carpenters – While they initially sought to rely on the trade union status they were awarded in *Proaction* and *Tops*, the SMW led new evidence to establish its status, independent of the earlier applications – The Carpenters sought an order from the Board revoking the earlier certificates and barring the SMW from bringing fresh applications for a period of one year – While the Board expressed its concern for the alleged conduct of the SMW in *Proaction* and *Tops*, it found that the Carpenters had no standing to bring the instant complaint: the Carpenters had no collective agreement with either of these employers, and they could provide no evidence that they had been victims of the fraud and had suffered some loss – Application dismissed

MIKE ABAZA PROACTION ALUMINUM; RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; RE EASTERN EAVESTROUGHING LTD.; RE JACKSON ROOFING GTA INC.; RE 413554 ONTARIO LTD. C.O.B. CHOUINARD BROS. ROOFING; RE BURNHAMTHORPE ROOFING; RE DONIA ALUMINUM & ROOFING LTD; RE COLOMBUS ALUMINUM AND ROOFING LTD; RE TRUDEL & SONS ROOFING LTD; RE E.P. SIDING INC.; RE EXPERT EAVESTROUGHING; RE CHOUINARD BROS.

ALUMINUM LTD.; RE GIANCOLA ALUMINUM CONTRACTORS LTD.; RE GM EXTERIORS INC.; ASPEN ALUMINUM LTD.; RE GORESKEI ROOFING AND LATHING LTD.; RE GTA ALUMINUM INC.; CRO ALUMINUM INC.; File Nos. 1267-07-U; 1268-07-U; Dated September 24, 2007; Panel: David A. McKee; John Tomlinson; Richard Baxter (8 pages)

Reference – Hospital Labour Disputes Arbitration Act

– This Ministerial reference requested the Board's advice on whether employees of Montfort Renaissance Inc. ("MRI") were covered by the Act – The Board used the following criteria to determine whether MRI met the statutory definition of a "hospital" as set out in the HLDA: (i) the entity must serve persons who suffer from physical or mental illness, ongoing disease or be convalescent or chronically ill; (ii) the entity must be a hospital or "other institution"; and (iii) the entity must be operated for the observation, care or treatment of such persons – Firstly, the Board held that there could be no doubt that persons whom MRI served in all three of its programs (mental health and housing, health stop, and Detox Centre) were persons who suffered from physical or mental illness – Secondly, having regard to the purpose of the HLDA, which is to ensure uninterrupted delivery of services to those vulnerable persons whose health and safety could be jeopardized if those services were unavailable because of a strike or lockout, the Board found that MRI's Detox Centre met the definition of "hospital" in the HLDA – In response to MRI's assertion that the Addiction Workers working in the Detox Centre did not provide services that could be characterized as medical in nature and did not have any medical training, the Board held that the observation, care or treatment contemplated under HLDA need not be medical in nature to fall within the statutory definition – Thirdly, the Board was satisfied that the Detox Centre was operated for the observation, care and treatment of residents in the detoxification process – Finally, regarding the question of whether MRI, when considered as a whole (all three programs), was properly characterized as an "other institution", the Board held that it was, since the statutory scheme contemplated the possibility of over-inclusion – In the result, the Board's advice to the Minister was that MRI was a "hospital" within the meaning of the HLDA

MONTFORT RENAISSANCE INC. (SERVICE DE SANTÉ DES SOEURS DE LA CHARITÉ D'OTTAWA); RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4540; File No. 4225-05-M; Dated September 5, 2007; Panel: Caroline Rowan (17 pages)

Certification – Construction Industry – An employee alleged that he had been misled into signing a membership card contrary to s. 128.1(5) of the LRA – The Board stated that in considering allegations of this nature, it is important to distinguish between an employee's change of heart about joining a union, and a genuine subsequent realization that the consequences of the employee's signing a card were substantially different from what had been represented to him/her – In this case, the Board found that no misrepresentation had been made to the employee and that he simply had had second thoughts about joining the union – In coming to this conclusion, the Board noted that the employee: had presented two contradictory explanations that were unreasonable; had signed the membership card which was simple and straightforward; had provided a considerable amount of personal information on the membership card that was inconsistent with his explanation for signing the card; and had familiarity with being a member of a union from a previous place of work – Accordingly, the Board gave no weight to the submissions made by the employee and declined to order a hearing to receive evidence from him about the allegations he made – Certificate granted

SILVER CONCRETE PUMPING LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 1330-07-R; Dated September 5, 2007; Panel: David A. McKee (5 pages)

Construction Industry Grievance – Jurisdictional Dispute – The Sheet Metal Workers challenged the assignment of covers for columns in an office building atrium to the Carpenters – The Board determined that the dispute involved only 12 of 27 columns, because it centred on the air-handling features at the top of the particular columns – The unions agreed that each of them had the authority to perform the work, and that the Board's traditional criteria for resolving jurisdictional disputes for the most part were either not present or not helpful – The Board accepted the Carpenters' submission that it should therefore have regard to the practical realities of how the construction unfolded on a day-to-day basis – Since the erection and covering of the columns had been contracted to a drywall contractor in a bargaining relationship with the Carpenters, it would have been inefficient to import the Sheet Metal Workers and try to integrate them into the other construction work being carried out – The Board held that the work

was properly assigned to the Carpenters, and the Sheet Metal Workers' grievance was dismissed

SMITH BROTHERS CONTRACTING CORP.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 473; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1946; File Nos. 2309-05-G; 3113-05-JD; Dated September 5, 2007; Panel: Mary Ellen Cummings (4 pages)

Colleges Collective Bargaining Act – Employee – Status – OPSEU asked the Board to determine whether four continuing education instructors were employees under the CCBA and, if so, whether they fall within the academic bargaining unit – St. Lawrence brought a motion seeking to have the Board defer the issue to arbitration – The Board held that its powers under s. 81 of CCBA were similar to the jurisdiction it enjoyed regarding employee status disputes under s. 114(2) of the LRA – The parties agreed, and the Board accepted, that arbitrators had the authority to make the same determinations – The Board was not satisfied that there was any overriding public policy or remedial opportunity that made it more appropriate than arbitration for a determination of the issue – Application dismissed

ST. LAWRENCE COLLEGE; RE OPSEU; File No. 2193-04-M; Dated September 19, 2007; Panel: Ian Anderson (10 pages)

Court Proceedings

Duty of Fair Representation – Judicial Review – Reconsideration – The Board exercised its discretion not to inquire into a duty of fair representation complaint when it ascertained the complaint was virtually identical to an earlier application that the applicant had withdrawn – The Board subsequently dismissed the applicant's request for reconsideration – On judicial review, the Court found the Board had acted reasonably and within its jurisdiction – Application for judicial review dismissed

SCADUTO; RE UFCW; File Nos. 1798-03-U; 4338-02-U (Court File No. 382/05) Dated September 17, 2007; Panel: Jennings, Gans and Coats, JJ. (1 page)

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
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Limen Masonry et al v. Brick and Allied Craft et al Divisional Court No. 413/07	3862-05-R; 3864-05-R	Pending
Dev Misir v. Muluneshi F. Agago et al Divisional Court No. 281/07	0769-06-ES	Pending
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	December 3, 2007
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	January 10, 2008
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	Heard March 21, 2007 reserved
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Dismissed – August 13/07 Seeking leave to C.A.
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	March 10, 2008
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	October 9, 10, 11, 2007
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Dismissed - Sept. 17/07
Maystar General Contractors Inc. v. IUPAT, Local 1819 Divisional Court No. 481/06 Court of Appeal No. C47489	0812-06-R	Court of Appeal March 25, 2008

Greater Essex County District School Board v. IBEW Local 773 Divisional Court No. 126/06 Motion for Leave No. M34720 S.C.C. No. 32171	1702-04-R; 3172-04-R; 3174-04-R	3120-04-R; 3173-04-R;	Seeking leave to S.C.C.
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