

H *Ontario Labour Relations Board* **HIGHLIGHTS**

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June 2007

OLRB Advisory Committee

The Board is pleased to announce the establishment of the OLRB Advisory Committee. Please see the attached Terms of Reference. The first meeting of the Committee is scheduled to take place on Thursday, October 4, 2007 at the Board's offices.

After Hours Practice

The Board's normal business hours of operation are 8:30 a.m. until 5:00 p.m. Monday to Friday. The Board is closed on weekends and statutory holidays. In the normal course all applications will be dealt with during this time.

In those unusual circumstances where a party anticipates requiring the Board's services during non-business hours, the applicant will arrange, or attempt to arrange, during normal business hours, for service and notice to the other prospective parties via phone/email/ physical service in advance of the request for Board services during non-business hours.

Once the Board receives the request a determination will be made by the Board, and notice will be provided to all the parties, setting out if, how, and when, the application will proceed.

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.

Evidence – Health and Safety – Practice and Procedure – The Board ruled on the admissibility of evidence in this health and safety appeal (for a history of the matter, see [2006] OLRB Rep. September/October 648) – The Board held that since the orders under appeal dated from 2002, only the evidence available before the issuance of the orders would be admissible – To allow the inclusion of subsequent events could condone conduct that, absent the appeal, would have constituted a contravention of the Act – Since no orders were issued regarding work done after 2002, the Board had no authority to adjudicate what happened after that date – Matter continues

1353837 ONTARIO INC./LAWRENCE RYAN; RE PETER MARTIN AND JOHN DENNIS, INSPECTORS File No. 1227-06-HS; Dated May 22, 2007; Panel: Peter F. Chauvin (4 pages)

Construction Industry Grievance – Jurisdictional Dispute – Remedies – Following a finding that Bondfield had incorrectly assigned drywall taping work to the Painters in the Kingston area, the Bricklayers sought damages for the breach – The Board canvassed its jurisprudence in JD-related damage claims, where it asks: was the action of the employer substantively unreasonable or was there procedural unreasonableness in the employer's decision-making process? – In this case, the Board found that the assignment by Bondfield clearly violated two important factors that would constitute indicia of unreasonableness (an earlier Board decision; and area practice) – Bondfield argued that its actions were not unreasonable and, in any event, it was not the employer proper since it had subcontracted the taping work to Oakdale, a party

bound exclusively to the Painters agreement – The Board held that a work assignment which flies in the face of an unequivocal earlier Board ruling involving the same three parties amounts to second guessing the Board decision and will not be countenanced; a claim for work on the basis of a Board decision in a JD is superior to other claims based on other factors – Grievance allowed; quantum of damages remitted to the parties

BONDFIELD CONSTRUCTION; RE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 10 AND INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 10; File No. 4018-05-G; Dated May 8, 2007; Panel: Mark J. Lewis (17 pages)

Related Employer – Sale of a Business – CUPE alleged that the City of Ottawa and the other responding parties were a single employer or, alternatively, that there had been a sale of business under the Act because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the city – The union was unable, however, to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The employer brought a motion to have the application dismissed, or deferred to arbitration, arguing that there had been no disposition of any functional economic vehicle or part thereof by the city, that the city's existing relationships with both CUPE and the contractors permitted contracting out, and that any operational control over the work performed by the contractors was to be expected given the city's mandate to provide municipal services – Motion granted, application dismissed

CITY OF OTTAWA; RE CUPE, LOCAL 503; RE B & G GORHAM CONSTRUCTION INC.; RE ROB BURNS OPERATING AS BURNS LANDSCAPE MAINTENANCE, CONCORDIA PAVING LTD.; RE THOMAS CAVANAGH CONSTRUCTION LTD.; RE EXEL CONTRACTING INC.; JAKE'S LAWN CARE; RE KERN'S PROPERTY MAINTENANCE; RE LANDTECH INC.; RE LAURENT LEBLANC LTD.; RE M.A. THOMPSON CARTAGE LTD.; RE MALCOLM MORRIS OPERATING AS MAC MORRIS CARTAGE & EQUIPMENT RENTALS AND MAC & MIKE MORRIS EQUIPMENT RENTALS, MOUNTAINVIEW TURF FARM LTD.; RE YANNICK BRULE OPERATING AS NEED A CUT SERVICES, PROP-COM MANAGEMENT INC.; RE QUINN & COMPANY AND KANATA WEST LANDSCAPE MAINTENANCE; File No.

1386-06-R; Dated May 8, 2007; Panel: Patrick Kelly (14 pages)

Discharge – Employment Standards – The applicant asserted that her pregnancy played a role in the employer's decision to terminate her – The onus of establishing that there was no contravention of section 74 of the Act lies on the employer – The Board was satisfied that the employer fulfilled its burden; the Board drew no adverse inference from the employer's failure to call the employer's spouse when the applicant had not asserted in her application or at the hearing that the spouse was aware of the pregnancy – Application dismissed

DR. EMAD HANNA; RE RAJAE ELALAMI AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2515-06-ES; Dated May 2, 2007; Panel: Susan Serena (5 pages)

Practice and Procedure – Termination – Timeliness – This application under s. 66 of the Act, was filed one year to the date of the signing of the voluntary recognition agreement – The responding party argued that it was out of time, and that the applicant was not at work in the bargaining unit on the date of application – The Board found that an application under s. 66 of the Act does not fall within the construction provisions of the Board's Rules, so Rule 3.4 applies, rather than Rule 24.2 – The applicant used the services of a private courier (not Priority Post), so the application date was the date the materials were received by the Board – The applicant was on leave from the employer on the date of application, and therefore not at work in the bargaining unit on the filing date – For all of these reasons, the application was dismissed

DRYDEN ELECTRIX INC.; RE JOSEPH RYAN OLIVERSON; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO; File No. 2960-06-R; Dated May 2, 2007; Panel: Mark J. Lewis (6 pages)

Certification – Construction Industry – BACU filed a series of card-based applications to certify the employees in bargaining units for which it already holds bargaining rights – The union asserted it had the statutory right to seek reconfirmation of its member support – Given that the union demonstrated evidence of greater than 55% support for each unit sought, there was no need for a vote – It appeared to the Board that BACU was pre-empting any possible raids to its incumbent units – Although it expressed its

reluctance to sanction BACU's conduct, the Board felt it was inappropriate to engage in a challenge to that conduct – The Board noted that such an application appeared to be an indirect application for termination of a collective agreement, and could possibly be a means of redesigning a bargaining unit without the employer's approval – Nonetheless, the Board determined it must proceed with the applications – Matters continue

GEORGE & ASMUSSEN LIMITED et al; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE IUBAC LOCAL 6; RE IUBAC LOCAL 7; RE IUBAC LOCAL 20; RE BCM MASONRY RE; VAUGHAN MASONRY; RE TWIN MASONRY INC.; RE BERNEL MASONRY LTD.; SQUIRE MASONRY LTD.; RE VINMOD CONSTRUCTION; RE CANEX MASONRY LTD.; MAC MASONRY INC.; File Nos. 4149-06-R et al; Dated May 28, 2007; Panel: Corinne F. Murray; John Tomlinson; Alan Haward (6 pages)

Bargaining Unit – Public Sector Labour Relations Transition Act, 1997 – Five community care access centres (CCACs) were merged – OPSEU applied to the Board for a determination of the appropriate bargaining agent and bargaining unit(s) – The applicant represents 190 of the affected employees in the single largest predecessor bargaining unit – The applicant asserts that a single “all employee” bargaining unit is appropriate, whereas the employer, CUPE and ONA assert that there should be two bargaining units: one comprised of professional employees and the other of office and clerical employees – The Board noted that both options are consistent with the purpose of s.22(7) of the Act – Finding that either a single unit or a two-unit configuration could comfortably obtain for the newly-configured CCAC, the Board signaled its preference to maintain the *status quo* where there are existing, fully functional collective bargaining relationships – In this case four of five CCACs, or approximately sixty-five per cent of employees, operated under a two bargaining unit system – Two bargaining units ordered (*Editors' note:* Following the counting of the ballots, OPSEU won the office and clerical unit; ONA became the bargaining agent for the professional employees: decision dated May 12, 2007)

HAMILTON NIAGARA HALDIMAND BRANT COMMUNITY CARE ACCESS CENTRE; RE OPSEU; RE HAMILTON COMMUNITY CARE ACCESS CENTRE; RE BRANT COMMUNITY CARE ACCESS CENTRE; RE COMMUNITY CARE ACCESS CENTRE NIAGARA; RE COMMUNITY CARE ACCESS CENTRE OF HALTON; RE HALDIMAND-NORFOLK COMMUNITY CARE ACCESS CENTRE; RE

CUPE AND ITS LOCAL 4700; RE ONTARIO NURSES ASSOCIATION; File No. 3017-06-PS; Dated May 1, 2007; Panel: Brian McLean (10 pages)

Employee – Employment Standards – The employer sought review of an employment standards officer's order to pay wages to two employees – The employer argued that the individuals were independent contractors and not employees, and therefore not subject to the Act – The Board held that the employer, a construction contracting business, engaged individuals to perform work on a project by project basis: the company's director found the work, estimated the cost of the job, estimated the price, then hired the individuals to work on the projects; payments were made every two weeks or at the end of the job; individuals were not free to assign work to others – The Board found that an employment relationship existed between the parties, and that poor performance was no reason to deny the employees their wages – Application dismissed

ILARIS CORPORATION; RE ARTEM GADZEVYCH; RE MIKHAIL KATAYEV; RE VICTOR CHORIKOV; RE TATIANA CHLYGINA AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0833-06-ES; Dated May 25, 2007; Panel: Ian Anderson (5 pages)

Discharge – Health and Safety – Reprisal – The applicant complained that she had been discharged for raising health and safety concerns associated with some renovations undertaken by the employer – The Board found the employer had addressed the employee's concerns in several ways, including changing the employee's shift – The Board held that the applicant had simply decided to move on to a job she knew was available to her, and wished to take advantage of what had transpired in the workplace to seek a monetary benefit – Application dismissed

IVY VETERINARY SERVICES; RE KRISTINE NEVILLE; RE DR. CATHY EMMS; File No. 0487-06-OH; Dated May 31, 2007; Panel: Tanja Wacyk (9 pages)

Employment Standards – The applicant sought review of a refusal to award him overtime pay from his employer, for work carried out in the U.S. – The employer argued that the work in the U.S. was not a continuation of work performed in Ontario, and accordingly was not work covered by s.3 of the Act – The Board found that the

applicant's work in Michigan was indeed a continuation of work performed in Ontario, because the applicant transported materials from Ontario to the U.S job site and then assisted in the installation of those materials in the U.S. – Application allowed; overtime pay awarded (This decision came to the editors' attention subsequent to the preparation of the May 2007 *Highlights*)

JAMES WAY CONSTRUCTION INC.; RE TONY SHEARING AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3754-05-ES; Dated April 25, 2007; Panel: Patrick Kelly (3 pages)

Certification – Construction Industry – Practice and Procedure – Timeliness – The Board finds that in a card-based application for certification, there is no prejudice to the union if the responding party fails to provide the response to the union at the same time it files it with the Board – The response was delivered to the applicant one week after it was due – The Board relieves against the late delivery of the response – Matter continues

LEMMO MASONRY INC.; RE LIUNA LOCAL 527; File No. 0098-07-R; Dated May 8, 2007; Panel: Susan Serena (4 pages)

Interim Relief – Trusteeship – Local 31 filed a s. 149 application challenging the imposition of supervision over it by BACU – BACU sought interim relief from the Board to be able to continue its trusteeship because of the Local's alleged failure to resist displacement overtures brought by another union – The Board held that s. 98(1)(a) gave it the authority to do what was necessary to preserve its processes; an interim ruling might well be required to preserve some prevailing conditions for the purpose of being able to adjudicate them – The Board found that BACU had successfully met the three factors necessary for the granting of interim relief: (1) BACU has put forward a defence to the s. 149 complaint that makes out a strong *prima facie* case; (2) the parent union will suffer irreparable harm in that if the relief is not granted, their ability to participate meaningfully in the litigation will be nullified; and (3) the balance of labour relations harm points to maintaining the integrity of the Board's processes until the substantive relief can be adjudicated – Furthermore, Local 31 appeared to have taken the law into its own hands rather than have the Board or the courts deal with its dispute with BACU when it transferred its assets to a new membership trust fund – The Board amended its earlier ruling of April 16, 2007 and refrained from making any order with respect to the trust fund; similarly, it made no determinations with respect

to other monies held by the various parties in these proceedings – Interim relief granted

MARBLE, TILE & TERRAZZO, LOCAL 31; RE BRICK AND ALLIED CRAFT UNION; RE KERRY WILSON; RE TOM WILLIAMS; RE JOHN HAGGIS; RE JOE PLUNKETT; RE CAMERON MACKAY; RE FRANK ROCCA; File No. 4138-06-M; Dated May 4, 2007; Panel: David A. McKee (12 pages)

Certification – Employee – Status – The Board examined the position of "inventory clerk" or "auditor" for purposes of certification of a clerical unit of the employer's employees – The parties had earlier agreed to alter the recognition clause of the employer's production unit because the auditors were supervisors within the meaning of the bargaining unit description – In the current application the union sought to have the auditors excluded either because they were supervisors or because they performed managerial functions within the meaning of s. 1(3) of the Act – The Board held that since the parties had agreed the auditors exercised supervisory functions so as to be excluded from the production unit, and there was no material change in their status prior to the instant application, they remained supervisors within the meaning of the clerical bargaining unit – Status determined

PENSKE LOGISTICS; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 880; File No. 2251-06-R; Dated May 31, 2007; Panel: Patrick Kelly (4 pages)

Employment Standards – The employer challenged an order for vacation and termination pay – The employer argued that any paid time off during the employment relationship could constitute paid vacation – The Board held that the *Employment Standards Act, 2000* does not provide that a day's wages paid in circumstances where the employee did not work necessarily constitutes a vacation – Further, the Board found that the employer immediately terminated the employee when she attempted to give two weeks' notice of her resignation – Application dismissed – Order adjusted to reflect full entitlement to termination pay

PETER J. DOUCET ; RE ELIZABETH PITTUI AND DIRECTOR OF EMPLOYMENT STANDARDS ; File No. 3705-05-ES; Dated May 8, 2007; Panel: Patrick Kelly (6 pages)

Employment Standards – Premier Fitness challenged an order requiring it to pay holiday pay to two personal trainers, arguing they were elect-to-work employees and exempt from such payment pursuant to s. 9(k) of O/Reg. 285/01 – The Board found that the employer scheduled the trainers for work beyond their declared availability, and expected them to meet the employer's needs – The elect-to-work status was illusory – Applications dismissed; orders to pay affirmed

PREMIER FITNESS; RE JANIS STRATHDEE; RE ELAINE FLETCHER AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 2471-06-ES; 2472-06-ES; Dated May 31, 2007; Panel: Kelly Waddingham (3 pages)

Certification – Construction Industry – Employer – Practice and Procedure – Related Employer – Timeliness – The Board found nothing wrong with the application naming three possible employers as responding parties: the applicant specifically referenced subsection 1(4) and asked that the certificate name all three entities – The responding party filed its response five days late but asked the Board to exercise its discretion to accept the late-filed information in accordance with the ruling of the Divisional Court in *Maystar* (see [2007] OLRB Rep. March/April 459) – The Board examined possible criteria for the exercise of discretion: the nature of certification applications and the need for speed in their determination; the reasons for the late filing; prejudice to the applicant – The Board finds that prejudice is present in every case, and will be the same in every case – In the circumstances of this case, the Board does not exercise its discretion to accept the late-filed information – The applicant delivered its materials to three fax machines for the three employers; personal delivery is not a requirement of the Act or the Board's Rules – Time extension allowed for response to related employer allegations – Matter continues

REIDS UPTOWN HOMES, REIDCO NORTH LTD., S.R. PROPERTIES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0332-07-R; Dated May 16, 2007; Panel: David A. McKee (11 pages)

Certification – Construction Industry – BACU filed a card-based application to certify the employees in a bargaining unit for which it already holds bargaining rights – When asked by the Board to explain its motivation, the applicant submitted that it need not provide any justification other than to assert it was exercising its statutory rights – Notwithstanding the Board's concerns that a grant of the application would place the

applicant in the exact position it occupied when it made the application (as would a dismissal of the application), and despite the fact that granting the certificate would allow the applicant to unilaterally obtain early termination of its existing collective agreement, and in the absence of any opposition from either the responding party or the intervenors, the Board could find nothing in the Act to explicitly preclude the application for certification – In the absence of any opposition to the application, the matter is allowed to proceed – Matter referred to Regional Certification Meeting

STEFCON CONSTRUCTION INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE IUBAC LOCAL 6; RE IUBAC LOCAL 7; RE IUBAC LOCAL 20; File No. 4171-06-R; Dated May 28, 2007; Panel: Harry Freedman; John Tomlinson; Alan Haward (5 pages)

Construction Industry – Practice and Procedure – Termination – Timeliness – The application was received by the Board on May 4, 2007, having been delivered to a courier on May 2, 2007 – The Board held that as a rule an application is filed on the day the Board actually receives it, the only exception occurring in the construction industry where certifications and terminations given to Priority Courier will be deemed to have been filed on the date they were given to the courier (Rule 24.2) – The applicant in the present case gave his application to a different courier – The Board was not prepared to extend the exception beyond the one contemplated in the Rules – Application dismissed

YORKWOOD HOMES; RE MARK JONES; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File No. 0492-07-R; Dated May 29, 2007; Panel: David A. McKee (2 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.

**TERMS OF REFERENCE FOR THE
ONTARIO LABOUR RELATIONS BOARD ADVISORY COMMITTEE**

1. The Ontario Labour Relations Board (hereinafter “the Board” or the “OLRB”) has established an Advisory Committee whose mandate is to function as a consultative group for the Board. The Committee is composed of members of the labour and management side bar, and is intended to act as a resource to the Board for consultation and feedback regarding:
 - (i) Board policies;
 - (ii) Board practices;
 - (iii) Board rules;
 - (iv) Board practice directions.
2. The Advisory Committee will also bring to the Board’s attention comments regarding any of the above matters, as well as comments regarding Board staff, appointees, and services.
3. The Committee is not a forum for the discussion of the merits of individual cases nor is it a forum for comment on proposed or possible legislative amendments, white papers or regulations.
4. The Committee shall be available to the Board for consultation regarding board appointments.
5. The Committee shall be composed of the following members:
 - (i) the Board’s Chair and Solicitor;
 - (ii) five appointees from the labour side of the bar who will represent the views of trade unions and unrepresented employee litigants;
 - (iii) five appointees from the management side of the bar who will represent the views of management;
 - (iv) a representative of the Ministry of Labour;
 - (v) member of the executive of the Labour Law Section of the Ontario Bar Association (“OBA”) who is not employed as an arbitrator, Board member, or otherwise as an adjudicator, who shall sit as an ex-officio member of the Committee.

Appointments to the Committee will be for three year terms, and the timing of appointments will be staggered in order to ensure continuity. Each of the OBA,

labour and management sides of the bar will determine their own methods for appointing committee members and their respective co-chairs.

6. The Committee shall meet at least three (3) times per year.
7. Members of the community will be made aware of the Committee's meetings and discussions through minutes which will be posted on the Board's website. It is also expected that the Committee can provide a forum for bi-partisan discussion of issues of general interest to the labour relations community.
8. In order that the Committee may function in an atmosphere that encourages candour, members of the Committee will maintain reasonable discretion and confidentiality with respect to committee discussions.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
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	Pending
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	June 20, 2007
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 Journeyman 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
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	January 10, 2007 (reserved)
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	Leave to appeal to C.A. dismissed May 23/07
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	Court of Appeal – Oct. 9, 10, 11, 2007
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U 3552-00-U	Leave to appeal to C.A. dismissed May 22/07
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.