

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 August 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 – Remedies – Representation Vote – Unfair Labour Practice – The union filed membership evidence on behalf of fewer than 40% of the bargaining unit, seeking remedial certification under s. 11 based on its accompanying unfair labour application – The employer's s. 8.1 notice was conceded to be relevant – The union requested that a vote be held, and the Board found that since a representation vote was one of the possible outcomes under s. 11, it would be preferable to hold the vote as close to the application date as possible – Also there was no need to seal the ballot box since it would not affect the outcome of the notice under s. 8.1 and the results of the vote would be a relevant consideration for the Board in granting relief under section 11 – Representation Vote ordered; matter continues

792844 ONTARIO INC. O/A SECORD CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File Nos. 1709-07-R; 1708-07-U; Dated August 28, 2007; Panel: David A. McKee; Barry Roberts; Alan Haward (3 pages)

Health and Safety – The Board has the jurisdiction to review an order of an inspector under s. 61 – Where a Regional Director of the Ministry of Labour, who is also an inspector under the OHSA, makes an Order under s. 9 as the delegate, or purported delegate, of the Minister, the Board has no jurisdiction to review the Regional Director's action – Whether the Regional Director was acting under properly delegated authority is a matter for the Superior Court of Justice, not the Board – Applications dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD AND SOPHIE DENNIS, INSPECTOR; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; File Nos. 1368-07-HS; 1369-07-HS; 1385-07-HS; 1386-07-HS; Dated August 17, 2007; Panel: David A. McKee (3 pages)

Duty of Fair Referral – Unfair Labour Practice – The employee claimed that the union had breached its duty of fair referral by refusing to readmit him after he had resigned his membership – He alleged that, as a result of this refusal, he was unable to obtain employment under the collective agreements by which Local 675 is bound, including its province-wide ICI agreement – The Board refused to adopt an expansive interpretation of s. 75, which would extend the duty owed by unions beyond the "selection, referral and assignment of persons for employment," to encompass all union decisions, including a decision to not admit someone to membership – The Board noted that this was in keeping with its interpretation of s. 75 over the last 25 years – The Board distinguished the case of a person seeking admission to membership from

one of someone who had been expelled – In the case of a person expelled who alleges a breach of s. 75, the duty under that provision is still owed by the union to the point of the expulsion – A person who is not actually a member of the union, however, has no relationship with the union, as they are neither bargaining unit employees nor persons referred to the union by an employer to be name hired – The union cannot owe a duty under s. 75 to a person with whom it has no relationship – Application dismissed

PAUL L. STEWART; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DRYWALL ACOUSTIC LATHING AND INSULATION, LOCAL 675 ; File No. 3071-06-U; Dated August 3, 2007; Panel: Harry Freedman (7 pages)

Jurisdictional Dispute – Construction Industry – Interim Relief – Reconsideration – Remedies – Strike – In the context of a jurisdictional dispute the Board issued an interim order, on reconsideration, assigning the disputed work to the Carpenters, after determining that the Labourers had engaged in strike activity designed solely to influence the assignment of work – The Board noted that the purpose of an interim order in a s. 99 context is to maintain the “status quo” pending the resolution of the application – The Board found that the “status quo” for the disputed work was that it had been performed exclusively by members of the Carpenters – The Board also noted, without deciding, that the Labourers claim to bargaining rights, and therefore a right to strike, at the project in question was problematic – The Board found that the Labourers had not negotiated or concluded any new collective agreements with the struck employers at the project – The only benefit that the Labourers had obtained as a result of the strike was an agreement from the constructor and two contractors to assign the disputed work only to subcontractors who employed members of Labourers – The Board therefore concluded that the sole purpose of the strike was to exert economic pressure on the constructor to assign the disputed work to the Labourers – The Board has consistently found that to engage in a strike in order to secure a work assignment is either unlawful or improper such that it will grant interim relief, whether or not the strike is otherwise lawful – The structure of the Act properly recognizes that pressing the issue of the assignment of particular work to impasse is undesirable, given its effect on the potential rights of parties outside the bargaining process – Such action tends to promote a similar strike response from the third-party union (as occurred in this case), rather than the resolution of the dispute under s. 99 without a

work stoppage – The Board’s interim order directing that the work be assigned to the Carpenters was not made effective until two weeks after the order, or when it would have been made but for the illegal response strike of the Carpenters –Matter continues

SNC-LAVALIN POWER ONTARIO 1409096 ONTARIO LIMITED C.O.B. AS PERI SCAFFOLDING AND ALUMA SYSTEMS CANADA INC.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE LIUNA, LOCAL 506; File Nos. 1018-07-JD; 1017-07-U; 1019-07-U; 1020-07-M; Dated August 22, 2007; Panel: David A. McKee (11 pages)

Construction Industry – Jurisdictional Dispute – Remedies – Trades Qualification and Apprenticeship Act – The Ironworkers (IW) applied for a declaration and other relief under s. 99 of the Act in relation to hoisting and rigging of piping equipment weighing in excess of two tons carried out by members of the Plumbers and Pipefitters (UA) – The Board found that the majority of the area practice in respect of the work in dispute, when done by contractors bound by agreements with both unions, was assigned to either members of the IW exclusively or to a composite of UA and IW members – The Board further held that the two trade agreements to which the UA and IW were bound in the area remained in force, as they were not inconsistent with area practice – The Board found there was no material difference in terms of economy or efficiency to have UA rather than IW members perform the small amount of work involved, given that both UA and IW members were employed on the project – The Board rejected the UA’s argument that s. 3 of O. Reg. 572/99 under the *Occupational Health and Safety Act* limited the performance of the hoisting and rigging work in question to the plumber and steamfitter trades – In doing so, the Board noted that the work that a plumber or steamfitter does is found in s. 1 of their respective trade regulations under the *Trades Qualification and Apprenticeship Act*, and neither regulation limits hoisting and rigging work to one particular trade – The Board found that included in the scope of the work of an IW is the moving and placing of machinery and heavy equipment, which is required in order to perform the work described in para 1 of the IW Regulation – The Board noted, however, that the work of the trades under the TQAA is not synonymous with a union’s work

jurisdiction – On the basis of the trade agreements, the Board held that the work was properly assigned to members of the IW – Although no provision of the Act specifically allows for a prospective order regarding work assignment, the Board held that s. 99(5) was broad enough to encompass such a power – The Board declared that the hoisting and rigging work in question should be assigned to IW members, and directed the employer to assign that work to them in future

TESC CONTRACTING COMPANY LTD. AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 800; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 786; File No. 1668-06-JD; Dated August 17, 2007; Panel: Harry Freedman (13 pages)

“propped up” company “C” - There was sufficient evidence for the Board to conclude that the owner had not made a bankruptcy proposal “designed for rejection” – The Board did not err in considering cases decided under the former s. 12, as the issue of intent to defeat the ESA is still relevant under the current provision – The Board properly considered the conduct of the creditors in bringing about the bankruptcy in considering whether there was any impropriety connected with the insolvency, and whether the principals made reasonable efforts to avoid it – It was reasonable for the Board to conclude that the resources invested in a ‘phoenix’ company were not sufficient to keep company “C” operating – The Board’s decision was reasonable on the facts before it – Application for judicial review dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC., CATELECTRIC INC., 4064186 CANADA INC. AND THE ONTARIO LABOUR RELATIONS BOARD; File No. 0812-06-R (Court File No. 327/06) Dated August 13, 2007; Panel: Swinton, Lane, Bryant JJ. (12 pages)

Court Proceedings

Employment Standards – Judicial Review – Related Employer – Termination – Three companies appealed the ESO’s order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to “C,” a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the “relatedness” of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application – The employees applied for judicial review – The court held that the applicable standard of review was reasonableness, as per s. 119(14) of the Act – The court affirmed the Board’s interpretation of the test under s. 4 that there must be some connection between the relationship [between the companies] and the insolvency - The Board fully considered whether there was any *intent* to defeat the purposes of the Act when it considered how the owner came to acquire company “C” and that its status as a company separate from the others was at the insistence of the financing bank, not the principals – The Board also clearly considered the *effect* of the corporate structure in determining whether the purposes of the ESA had been defeated, and properly concluded that, rather than contributing to the insolvency, the other companies had

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, 7 th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
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	Pending
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	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
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