

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

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of this year. These decisions will appear in the November/December 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.

Health and Safety – Timeliness – The applicant sought to appeal an Inspector's Order pursuant to section 61 of the Occupational Health and Safety Act – On July 18, 2006 the Inspector prepared an Investigation Report and six days later the applicant wrote a letter to the Acting Program Manager of the Ministry of Labour raising concerns with the Report – The Acting Manager reviewed the Report and advised the applicant on August 4, 2006 that the employer had taken all reasonable precautions, and five days later provided the applicant with a written description of the appeals process pursuant to section 61 of the Act – The applicant claimed that the Acting Manager's letter dated August 4, 2006 constituted a decision and sought an appeal of it on August 29, 2006 – The Board found that the letter did not convey a decision or communicate the results of an investigation that was conducted under the Act – The Board determined that the application was not filed within 30 days of the Inspector's decision dated July 18, 2006 – The Board confirmed that it does not have the authority to extend the statutory time limit for filing an appeal under section 61(1) – Appeal Dismissed

AVENUE II COMMUNITY PROGRAM SERVICES (THUNDER BAY); RE SHARON FONTAINE; RE DOUGLAS CETTINA, INSPECTOR; File No. 1684-06-HS; Dated

December 4, 2006; Panel: Susan Serena (5 pages)

Discharge – Discharge for Union Activity – Interim Relief – Remedies – Unfair Labour Practice – Two union organizers were terminated in the midst of an organizing campaign and the union asked the Board to reinstate them on an interim basis pending resolution of the complaint – The employer argued it had terminated the two employees for cause, based on allegations of absenteeism and various performance and attitude issues – Neither of the employees had ever been disciplined nor had they received complaints from the employer prior to their terminations – The employer was aware that the two individuals were union supporters – The employees were notified about their terminations through email messages – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint – In doing so, the Board acknowledged that the period of time between an application for certification and the ultimate disposition is a particularly difficult one for a union in terms of maintaining the confidence of its supporters – The Board found the union would suffer irreparable harm in terms of erosion of support if interim relief of reinstatement was not granted and that the balance of harm favoured granting the order – Interim reinstatement ordered

AXA ELECTRIC INC.; RE IBEW LOCAL 353; File No. 2518-06-M; Dated December 1st, 2006; Panel: Ian Anderson (8 Pages)

Certification – Membership Evidence – Practice and Procedure – After a certification vote where sixteen of eighteen ballots were cast in favour of the union, the employer repeated in its post vote submissions the allegations in its

response: namely that two union organizers had come to the employer's office and stolen a contact list of current employees, which had been used for the purpose of contacting the employees during the organizing drive – The employer asked the Board to dismiss the application pursuant to its discretionary powers contained in section 23(1) of the *Statutory Powers and Procedure Act* arguing that the union's actions amounted to an abuse of process since the application for certification was the 'poisoned fruit' of the illegally obtained list – The Board noted that section 8(9) of the Act precluded the Board from having regard to allegations of this nature when disposing of an application for certification – The Board noted there was no allegation that the union's membership evidence was either false or misleading, nor were there any allegations that misrepresentations had been made to any employees – While the Board recognized that the union's alleged actions may have compromised the trust between the union and employer, employees' access to trade unions and collective bargaining are central purposes of the Act – The Board found there was no basis upon which to decline to grant the application for certification – Certification granted

CARE2000 HEALTH SERVICES; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1; File No. 1264-06-R; Dated December 1st, 2006; Panel: Ian Anderson; R. O'Connor; R.R. Montague (7 Pages)

Prima Facie Case – Related Employer – Sale Of Business – In order to build and operate a diamond mine, De Beers needed to construct an energy transmission line – Pursuant to the *Transmission Systems Code*, De Beers elected to build the line itself and upon completion would then be required to transfer ownership of the line to Hydro One – This process was established in a decision rendered by the Ontario Energy Board and was then implemented into the *Code* – Hydro One and De Beers brought two motions asking the Board to dismiss the Labourers' 69/1(4) applications without a hearing – The respondents sought to have the application dismissed as a collateral attack on the decision of the Ontario Energy Board and as disclosing no *prima facie* case – The Board determined that the application does not seek to attack or undermine the legal effect or order of the decision of the Ontario Energy Board, and is thus not a collateral attack – Although the Ontario Energy Board decision establishes that companies have the freedom to choose who they want to construct transmission lines, the issue of collective agreements and restrictions on contracting were not addressed in the decision – The Board confirmed that the test

for a *prima facie* case is high and discretion to dismiss a complaint on this basis should only be exercised in the clearest of cases – The Board dismissed the respondents' *prima facie* motion as the conveyance of the transmission line upon completion raises a sufficient case such that it cannot be said that the application stands no reasonable chance of success – Matter continues

DE BEERS CANADA INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; HYDRO ONE INC. (INCLUDING: HYDRO ONE NETWORKS INC., HYDRO ONE NETWORKS SERVICES INC., HYDRO ONE REMOTE COMMUNITIES INC.); File No. 2954-05-R; Dated December 5, 2006; Panel: David A. McKee (11 pages)

Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – Reconsideration – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 2386-06-R; Dated December 1st 2006; Panel: Harry Freedman (2 pages)

Order to Pay – Termination Pay – Rostrust Investments Inc. asked the Board to review four orders to pay in relation to the termination of four employees – The applicant owned a building complex and leased it to Public Works and Government Services Canada (PWGSC) – Pursuant to a contract, the applicant provided management, cleaning and maintenance services

to the leased space where the employees worked – PWGSC terminated this contract and decided to provide these services directly – As a result, the applicant terminated the four employment contracts – Each respondent commenced employment with PWGSC – The applicant employer claimed five grounds to be relieved of its duty to pay termination pay: a) the respondents were given notice, b) the respondents resigned by accepting jobs with PWGSC, c) the applicant fell within the purview of Section 10 of the Act as they were a “building services provider”, d) there was a sale of business, and e) termination pay would constitute a windfall as they respondents suffered no damages – The Board determined that the “sale of business” and “building service provider” provisions of the Act do not apply when the purchaser or new provider is subject to federal labour jurisdiction – Orders to Pay upheld – Applications dismissed

ROSTRUST INVESTMENTS INC./ INVESTISSEMENTS ROSTRUST INC.; RE TERRY DOXTATER; RE MARC PLOUFFE; RE RAYMOND CONLON; RE DARYL HARGROVE RE DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 0897-05-ES; 0898-05-ES; 0899-05-ES; 0900-05-ES; Dated December 1st 2006; Panel: Ian Anderson (10 pages)

Bargaining Rights – Construction Industry – Termination – Voluntary Recognition – In this application by the Painters to terminate the Plasterers’ bargaining rights under s. 66, Syntex was bound to the Painters’ Provincial Collective Agreement (which covered, among others, drywall tapers), when it obtained a subcontract from a general contractor bound to a collective agreement with the Plasterers’ requiring that plasterers’ work only be subcontracted to companies in contractual relations with that union – After commencing work and employing drywall tapers, Syntex entered into a voluntary recognition agreement with the Plasterers – The Board held that when there are actual persons employed in the bargaining unit, the union must demonstrate that it was entitled to represent those actual employees – Although the Plasterers’ could not show they were entitled to represent the employees in the bargaining unit on the applicable date, the Board noted it still had discretion under s. 66 to decide whether to terminate the bargaining rights – The Board, following *Penegal Trim*, found nothing to override the fundamental right of the employees of this particular employer to freely select their own union – The Board declared that the Plasterers’ were not, at the time the voluntary recognition agreement was entered into, entitled to represent employees in the bargaining unit set out therein, and that the

Plasterers’ bargaining rights obtained by voluntary recognition with Syntex were terminated as of the date of the Board’s oral decision – Application granted

R.P. SYNTEX WALLS SYSTEMS; RE IUPAT LOCAL 1891; RE OPERATIVE PLASTERERS’ AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA LOCAL 124; File No. 0395-06-R; Dated December 19, 2006; Panel: Mark J. Lewis; John Tomlinson; Alan Haward (9 pages)

Court Proceedings

Judicial Review – Related Employer – Sale of Business – On judicial review the court found that the standard was patent unreasonableness, that there was evidence to support the Board’s finding that Courtney Wheeler was a key man, that the Board was entitled to draw the conclusions that it did from the evidence, and that it made no error with respect to the application of s. 126(5)2 – Application for judicial review dismissed

C.M.G. INNOVATIONS CO. LTD.; RE OLRB; RE ONTARIO PIPE TRADES COUNCIL, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES OF AMERICA AND CANADA, LOCAL 819, CORNWALL & DISTRICT CONTRACTING LTD.; RE CITY & DISTRICT STEEPLEJACKS LIMITED, AND CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL 52; File No. 0652-03-R; (Court File No. 06-DV-1234); Dated December 6, 2006; Panel: Platana, Stong and Swinton JJ.

Construction Industry Grievance – Contempt – Stated Case – The Court found problems with the material before it respecting service on the respondents – The matter was adjourned to enable the applicant to either serve the respondents in accordance with the existing order or to obtain in Divisional Court motions court an order permitting service on some other basis – Matter adjourned

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS’ CEMENT MASONS’ AND RESTORATION STEEPLEJACKS’ INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD; 4212-05-G; 4213-05-G; 0330-06-G

Court File Nos. 244/06, 326/06; Dated December 7, 2006; Panel: Lane, Matlow and Smith JJ.

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
Trustee for LIUNA 183 v. OLRB et al Divisional Court No. 559/06	2049-03-U et al	February 12, 2007
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
Maystar General Contractors Inc. v. The International Union of Painters and Allied Trades, Local Union 1819 Divisional Court No. 481/06	0812-06-R	December 6, 2006 (reserved)
Johnson Controls Ltd. v. Brookfield Lepage Divisional Court No. 406/06	1634-04-R	January 24, 2007 (motion)
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	March 21, 2007
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Pending
C.M.G. Innovation Co. v. Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 Divisional Court No. 06-DV-1234 OTTAWA	0652-03-R	Dismissed – Dec. 6/06
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case) Divisional Court No. 326/06	0330-06-G	Adjourned – Dec. 7/06
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case) Divisional Court No. 254/06	4212-05-G; 4213-05-G	Adjourned – Dec. 7/06
Place Mont Roc v. United Steelworkers (Stated Case) Divisional Court No. 233/06	1684-05-U; 3719-05-U	Pending
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)
Elena, De Monelli Foerster v. Toronto Catholic District School Board (Civil Suit) Divisional Court No. 06-CV-310231PD1	1373-04-U	March 19, 2007
Bricklayers Local 7 v. 921879 Ontario Ltd. et al Divisional Court No. 06-DV-1209 OTTAWA	3261-04-JD; 3504-04-JD	April 3, 2007
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	August 15, 2006 (reserved)
Kostantinos Iannidis v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division Divisional Court No. DC 0500947400	2287-04-U	August 30, 2006 (reserved)
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending

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	Dismissed – May 31, 2006, leave to appeal to C.A. granted – Oct. 30/06
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U 3552-00-U	Dismissed – April 3, 2006, seeking leave to appeal to C.A.
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Jan/Feb. 2007
Tuquabo, Dawitt Divisional Court No. 03-DV-000935	2377-02-U	Dismissed Feb. 14/05; leave to appeal dismissed Jun 29/05; seeking leave to S.C.C.