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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.

Employment Standards – The employer sought review of the employment standards officer's order finding that the installation of septic tanks/systems was not captured by the Regulation exempting overtime pay until 50 hours per week – The Board found that the installation of the septic systems was not captured by the word sewers in the Regulation for two reasons: first, on a plain reading sewers are conduits or channels for the movement of waste, and are not entire sewage systems – The evidence showed that the key component of the employer's work was the installation of the septic tank, which is not a sewer – Second, on a purposive review of the Act and the regulation, and assuming there was some ambiguity, the Board found that it must construe the regulation narrowly and give it an interpretation that encourages employers to comply with the minimum standards – Application for review dismissed

1496161 ONTARIO INC. O/A TODD GRIER EXCAVATING; RE DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1889-08-ES; Dated June 29, 2009; Panel: Christine Schmidt (6 pages)

Construction Industry Certification – Non-Construction Employer – Status – The employer asserted the Board lacked the authority to issue certificates because the employer was a "non-construction employer" – The union argued the Board was not required to determine the non-construction employer issue as part of the certification application and that the employer had to bring a separate application to have that issue addressed – The Board followed *Amica Mature Lifestyles Inc.* finding that the employer's status as a non-construction employer is properly raised in the context of a certification application under s. 128.1 – The Board found nothing in the Act to suggest that the issue of the employer's status as a non-construction employer ought not to be dealt with in the context of a certification application – Indeed the structure of the Act made it clear that the Board could only issue certificates to the union with respect to an employer that is not a non-construction employer – Therefore the Board determined that the question of status will be decided in the context of the certification application – Matter continues

2095527 ONTARIO LIMITED C.O.B. AS EMBASSY SUITES; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0136-08-R; Dated June 11, 2009; Panel: Lee Shouldice (7 pages)

Health and Safety – Privilege – Suspension – Aecon sought a suspension of part of an Inspector's order requiring Aecon to produce its Incident Investigation Report, which it claimed was covered by solicitor/client and/or litigation privilege – The Board found that a suspension of the Order would not endanger worker safety (there were no preventative measures ordered for the protection of workers and all the other orders had been complied with); the prejudice to Aecon

(releasing a document that may be determined to be privileged) outweighed the prejudice to the Inspector; and Aecon has a strong *prima facie* case (the facts set out, if proven, suggest that the document is privileged) – Part of Order Suspended – Appeal to be heard

AECON CONSTRUCTION GROUP INC.; RE CEMENT MASONS LOCAL 598; JIM BONIFACE; File Nos. 0697-09-HS; 0509-09-HS; Dated June 23, 2009; Panel: Mark J. Lewis (5 pages)

Construction Industry Grievance – Seven grievors were suspended for a variety of days for distributing inappropriate emails over the employer's system – The union and grievors acknowledged that the distribution of the emails in question was inappropriate and constituted cause for discipline; the only issue was quantum of discipline imposed – In deciding not to substitute any lesser penalties for the suspensions imposed, the Board noted that: an employer has an interest and obligation to prevent a poisoned work environment and maintain one that is free from harassment; the emails were to varying degrees very offensive; the fact the emails were sent to individuals who may not have been offended was not relevant; no "warning shot" was necessary since the grievors were all fully aware of the employer's policy; and the way the employer determined the penalty was not arbitrary – The length of the suspensions were all within the range of reasonableness and the Board was not persuaded to change the discipline imposed – Grievance dismissed

BRUCE POWER LP; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 473; File No. 2158-08-G; Dated June 11, 2009; Panel: Diane L. Gee (14 pages)

Construction Industry – Delay – Standing – Unfair Labour Practice – Four members of the IBEW local brought an application against nineteen electrical contractors alleging they interfered in an election of officers to the Local by assisting the incumbent slate in their election efforts – The responding parties brought a motion to dismiss on a number of grounds – The Board found the members had no standing to bring a complaint under s. 72 or 76 as these sections prohibit conduct towards individual employees and the members were not employees nor were they authorized to represent any employees – The Board found however that they did have standing to bring an application alleging a breach of s. 70 since the allegation was arguably an interference in the administration of a trade union, however the Board went on to exercise its discretion not to inquire into the matter for four reasons: first, there was no basis for making a cease and desist order as requested; second, the "rule making and sanctioning role" was not in keeping with the general thrust of the Act; third, the delay was significant in that the complaint was brought well after the time the Board, or the employer, could do anything; finally, while the conduct complained of may breach s. 70, this is also not so plain and obvious – Complaint dismissed

CENTENNIAL ELECTRIC LTD. ET AL; RE ROBERT GULLINS ET AL; DISCOVERY ELECTRIC ET AL; RE IBEW; File No. 3281-08-U; Dated June 9, 2009; Panel: David A. McKee (6 pages)

Duty of Fair Representation – Remedy – Unfair Labour Practice – The employer awarded a part-time Residential Counsellor position to the applicant H, who had less seniority than V – The collective agreement contained a job-posting clause requiring the employer to award the position to the more senior candidate where there was relative equality on a number of factors – The Union filed a grievance on V's behalf and entered into a settlement with the employer in which V was awarded the position filled by H – H made three allegations: first, the Union failed to properly communicate with him about the status of V's grievance; second, that it was clearly evident that he had better qualifications and experience and that seniority should not have been a factor; and finally, the union did not communicate properly with him after he learned of the settlement – On the second point, the Board found that there was no "rational pathway" that was evident between the facts, competing interests and the decision made by the union – The union did not undertake a proper investigation to determine whether V's grievance was worthy of pursuit, and therefore whether she should have been awarded the position because of her seniority – The Board found the union's approach was clearly not rational and called out for an explanation—which was not provided – Accordingly, on this point the Board found a violation of s. 74 – The Board was also concerned about the union's failure to advise H of his right to participate at the arbitration of V's grievance, but on the facts was not prepared to make a finding of bad faith, or that it was so reckless as to constitute a violation – Declaration of a breach – Matter referred to Manager of Field Services

YWCA HAMILTON: RE SEIU LOCAL 1.ON; File No. 3449-07-U; Dated June 24, 2009; Panel; Lee Shouldice (17 pages)

Certification – Construction Industry – Practice and Procedure – Related employer – The employer filed its response to the union's challenges, but failed to deliver it to the union, in accordance with the Board's standard direction – The union asserted the employer had accepted the union's position and sought certification – The Board noted that the direction was not required by the Act or its Rules; that there was no consequence set out for a failure to deliver; and that the purpose of the direction was to facilitate discussion between the parties and to prevent gerrymandering the list – Finally, the Board found there was no prejudice to the union – The Board found there was no proper basis to refuse to permit the employer from maintaining their objection to the union's challenges – Matter continues

MANORCORE CONSTRUCTION INC. AND MANACORE HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 3729-08-R; Dated June 12, 2009; Panel: Harry Freedman (7 pages)

Certification – Discharge for union activity – Interim Relief – Unfair Labour Practice – The union, having lost a representation vote, receiving far fewer votes than the membership support it appeared to have on application, sought remedial certification under s. 11, ULP remedies, interim reinstatement of an organizer and an interim declaration that the employer revert to its past practice of awarding overtime – The Board found that there appeared to be a reasonable basis to conclude that the employer was aware of the organizer's involvement as a union supporter and that its decision to terminate was partly motivated by that – The Board's conclusion was supported by the aggressive position taken by the employer with respect to the union's organizing drive; the timing of the discharge being mere hours after the application for certification was filed; an unaddressed statement that the discharge was the result of a directive from head office; and uncertainty with respect to the interpretation and application of the Attendance policy – The Board also found that the denial of overtime hours to W appeared to be a departure from the employer's past practice which was not unrelated to the exercise of rights under the Act – The Board found the other factors under s. 98, to have been met and made a number of declarations, including reinstatement, and that employees have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support – Declarations made

MILLARD REFRIGERATED SERVICES, INC. RE TEAMSTERS LOCAL UNION NO. 419; File No. 0412-09-M; Dated June 11, 2009; Panel Ian Anderson (9 pages)

Certification – Employer – The sole outstanding issue concerned whether National or Erie Personnel was the employer of the drivers and pitchers working out of a waste and recycling yard in Stoney Creek – The facts were not in material dispute and the Board began its analysis by noting that the Supreme Court in *Pointe-Claire* made it clear that in assessing the true employer in these triangular relationships what is essential is determining which party exercises the greatest control over all aspects of the employee's work – The Board applied the factors from *York Condominium Corporation* and found only one factor pointed toward Erie (the intention to create an employment relationship) – The Board found that National had the fundamental control over the working conditions of the drivers and pitchers – Finally the Board noted that its finding was not altered by the recent (not yet in force) changes to the *ESA, 2000* under Bill 139 which will make temporary help agencies the employer for the purposes of the *ESA, 2000* – Certificate issued

NATIONAL WASTE SERVICES INC.: RE CAW-CANADA; RE ERIE PERSONNEL CORPORATION; File No. 0939-07-R; Dated June 8, 2009; Panel: Caroline Rowan (21 pages)

Certification – Construction Industry – Practice and Procedure – The OPDC filed with the Board its challenges to 12 of the 18 individuals the employer had listed as being employees in the bargaining unit, but failed to deliver the letter to the employer – The employer, referring to the Board's direction in its decision (and Information Bulletin #9), asserted that as the OPDC had not delivered its challenges, the list of employees was settled – The Board noted that neither its direction nor the Information Bulletin sets out any consequences for a failure to comply; that the purpose of the requirement was to prevent gerrymandering; that the employer did not suggest it was prejudiced by not receiving the OPDC's challenges (as the employer was notified about the challenges prior to the Regional Certification Meeting and replied to them) – Accordingly there was no legitimate basis for finding the OPDC's failure to notify the employer in a timely fashion precluded the OPDC from pursuing its challenges – Matter continues

NIACON LIMITED; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File Nos. 3598-08-R; 3599-08-R;

Dated June 30, 2009; Panel: Harry Freedman (6 pages)

Bar – Bargaining Unit – Certification – Employee – This application for certification encompassed at least one individual who was an employee in the bargaining unit proposed in a previous application that was dismissed by the Board – The issue before the Board was whether the s. 10(3.1) exemption to the bar imposed by s. 10(3) applied – The Board found that the first condition of s. 10(3.1) was not met since the employee's position at the time of original application (driver for the employer in the City of Toronto) was not different from her position at the time of the new application (driver for the employer in North Scarborough) – Concerning the employer's request to exercise its discretion to impose a further bar pursuant to s. 111(2)(k), the Board found it had none, since by virtue of the second application being barred, the Board was not able to "consider" it – Finally, the Board decided that even if it had the discretion to impose an additional bar, it would not since the original application was filed in January 2006 and an additional bar would subject the employees to a bar until June 2010, a far longer period of repose than contemplated by the Act – Application terminated

STOCK TRANSPORTATION LTD; RE TEAMSTERS; File No. 0483-08-R; File No. 0483-08-R; Dated June 25, 2009; Panel: Ian Anderson (9 pages)

Health and Safety – *Prima Facie* – The applicant alleged she was terminated by the company's President as a reprisal for raising health and safety concerns – On review of the Board's case law and the pleadings, the Board concluded that the pith and substance of the complaint was that she was unjustly terminated from employment for complaining about the President's verbal abuse (that is, alleged bullying, personal harassment and emotional and psychological abuse), which she found deeply insulting, demeaning and humiliating – Given, however, that there was no indication of the existence of a health and safety nexus the Board exercised its discretion not to inquire into the matter – Application dismissed

TEN STAR FINANCIAL SERVICES; RE SUSAN VOGAN; File No. 3041-08-OH; Dated June 3, 2009; Panel: Patrick Kelly (9 pages)

Construction Industry – Practice and Procedure – Termination – The union was certified on November 14, 2008 – Although the Board received the application for termination on May 15th, pursuant to the Rules, the application was filed on May 14, 2009, the day the applicant sent it by Priority Courier – Pursuant to s. 132(1) an application is untimely if made within 6 months of certification – The Board found it was clear (according to common law and the *Legislation Act*) that the 6 month period began on November 15th and expired May 14th at midnight – Therefore the application was untimely, having been made on the last day of the six month period – Application dismissed

WHITE CONTRACTING LTD.; RE ERIC PARADIS; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0496-09-R; Dated June 16, 2009; Panel: Harry Freedman; (4 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 (see [2006] OLRB Rep. March/April 248) – The application for judicial review was dismissed by the Divisional Court (see [2007] OLRB Rep. July/Aug 842) – First, the Court of Appeal noted the legislative mandate that the courts "not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable," and made it clear that it did not accept the applicants' argument that "the Divisional Court erred in failing to articulate first what in its view would be the correct interpretation of s. 4 before conducting its reasonableness analysis" – Second, the Court was not persuaded that the OLRB's decision under the current ESA "can be characterized as fitting into two competing incompatible lines of authority" and accordingly found it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions – Finally, the court reiterated that a reasonable

decision must be "justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" – The court found the Board's decision met that standard – Appeal dismissed

ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC; CATELECTRIC INC.; 4064186 ONTARIO INC.; Board File Nos. 2222-04-ES; 2223-04-ES; 2224-04-ES (Court File No. C48942); Dated June 18, 2009; Panel: Simmons, Blair, Juriansz JJ.A. (29 pages)

Certification – Charter of Rights and Freedoms – Construction Industry – Employer Support – Judicial Review – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

– On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52; Dated June 23, 2009; Panel: J.M. Wilson, Low, Ray, JJ (7 pages)

Construction Industry Grievance – Judicial Review – Non-construction Employer – Timeliness – In a preliminary decision the Board ruled that the grievance was timely; although the grievance was referred late to arbitration under the collective agreement the Board did have the discretion to extend the time for the referral; and it was appropriate to accept the referral to arbitration – Greater Essex sought judicial review of the Board's interim decision and the union brought a motion to quash the application as premature – The court found no exceptional circumstances that would persuade it to hear the application – The court stated that the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point – Motion granted – Application for judicial review quashed

GREATERS ESSEX COUNTY DISTRICT SCHOOL BOARD; PLUMBERS LOCAL 52; File No. 3122-04-G; Dated June 5, 2009; Panel: Carnwath, (1 page)

Certification – Construction Industry – Judicial Review – Natural Justice – Reconsideration – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

MACKENZIE GROUP CONSTRUCTION INC.; RE PAINTERS LOCAL 1891; Board file No. 1096-08-R; (Court File No, 532/08) Dated June 9, 2009; Panel: Swinton, Low and Bryant JJ. (6 pages)

Certification – Construction Industry – Judicial Review – The Board had found that three site superintendents were members of a bargaining unit, as they were not performing "managerial functions" pursuant to s. 1(3)(b) of the Act – The court found the Board considered the evidence before it; its past jurisprudence on the issue; and it clearly understood the reason for the exclusion was to prevent conflict of interest – Further the Board weighed the evidence and concluded the individuals were working foremen without significant influence over other individuals – The Board's reasons were clear and the conclusions fell within a range of reasonable outcomes, given the evidence – Application dismissed

ROCHON BUILDING CORPORATION RE CARPENTERS COUNCIL; Board File No. 3331-

03-R (Court File No. 127/09) Dated June 12, 2009; Panel: Swinton, Low, Bryant JJ. (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.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Roy Murad v. Les Ailments Mia Foods DV No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Pending
Greater Essex County District School Board v. Plumbers, Local 552 Divisional Court No. 177/09	3122-04-G	Motion to quash application granted - June 5/09
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	Pending
Universal Workers' Union, L.I.U.N.A. Local 183 v. Canadian Construction Workers' Union; OJCR Construction Ltd. Divisional Court No. 111/09	000-08-R	Pending
Central Ontario Regional Council of Carpenter, Drywall and Allied Workers, U.B.C.J.A. v. Rochon Building Corporation Divisional Court No.127/09	3333-03-R	Dismissed – June 12/09
I.B.E.W. Local 586 v. Christian Bourgeois, Regulvar Canada Inc. et al Divisional Court No. 95/09	3404-06-R	Abandoned – June 9/09
I.U.P.A.T. Local 1795 et al, v. Cadillac Fairview Corporation et al Divisional Court No. 142/09	1732-06-R	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	Pending – July 3/09
Presteve Foods v. (CAW-CANADA) Local 444 Divisional Court No. 1730/08 **LONDON**	1676-08-U	April 14, 2009 – dismissed; seeking leave to CA
The MacKenzie Construction Group Inc. v. I.U.P.A.T. Local Union 1891 Divisional Court No. 532/08	1096-08-R	Dismissed – June 9/09
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Construction Workers Local 52, Affiliated with the C.L.A.C. v. Pre-Eng Contracting Ltd.; et al Divisional Court No. 382/08	3798-05-R; 3958-05-U	Dismissed – June 23/09
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Ottawa Fertility Centre v. ONA et al Divisional Court No. DV-08-1394 **OTTAWA**	1531-06-PS	Heard April 8/09 - reserved
Universal Workers Union, L.I.U.N.A. Local 183 v. Canadian Construction Workers Union et al Divisional Court No. 201/08	0910-07-R	Abandoned – June 9/09
Ottawa-Carleton Public Employees Union	1386-06-R	Heard June 10/09;

Case name & Court File No.	Board File No.	Status
(CUPE), Local 503 v. City of Ottawa et al Divisional Court No. DC-09-00001471-0000 **OTTAWA**		reserved
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	C.A. April 22, 09 - reserved
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Court of Appeal No. C48942	2222-04-ES, 2223-04-ES, 2224-04-ES	Dismissed – June 18/09
Mohamed C.Z. Khan v. Royal Alliance Divisional Court No.461/08	2153-01-OH	Seeking leave to C.A