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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 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.

Certification – Construction Industry – Intervention – Reconsideration – Standing - Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721; File Nos. 1746-08-R; 2152-08-U; Dated May 13, 2009; Panel: Mark J. Lewis (20 pages)

Bar – Bargaining Unit – Certification – Representation Vote – CEP initially applied to certify the utilities department of the employer's employees – The employer disputed the appropriateness of the unit but failed to provide a different unit description and did not file a s. 8.1 objection – Although the CEP won the representation vote, the Board expressed concern about the propriety of the unit applied for, and sought submissions – Following receipt of the employer's submissions, the CEP filed a second application for certification, for a potential craft bargaining unit (operating engineers) – The Board determined that the original unit applied for was not appropriate and ordered a vote in an all-employee bargaining unit in the first application – The CEP then sought to withdraw the first application; the second vote did not take place – The Board addressed two issues: whether any conditions should attach to the withdrawal of the first application, and whether it should refuse to consider the second application – The Board held that when it ordered the second representation vote in the original file, it was signaling that the first vote was not meaningful and could not be considered "the" representation vote contemplated by s. 7(10) of the Act, which would lead to a mandatory bar – Because the bargaining unit voted on in the first vote was not appropriate, there was no expression of employee wishes in an appropriate unit – The union's withdrawal of the application before the second vote could only lead to the discretionary bar found in s. 7(9), and the Board chose not to impose a discretionary bar

– Second application for certification referred to Registrar for hearing

GREENFIELD ETHANOL INC.; CEP, LOCAL 203; File Nos. 1307-07-R; 2112-07-R; Dated May 20, 2009; Panel: Brian McLean (6 pages)

Health and Safety – PCL and the Labourers both sought suspension of an Inspector's orders requiring that only qualified sheet metal workers conduct the dismantling of certain heating and air conditioning materials as part of a hospital demolition – The Sheet Metal Workers Union had complained to the Ministry of Labour that the work was being carried out by persons without appropriate qualifications and therefore in violation of the OHSA and the *Trades Qualification and Apprenticeship Act* – The Board noted that there is a jurisdictional dispute involving the same parties arising from the same fact situation currently before it – The Board found that PCL and LIUNA have pleaded a strong *prima facie* case for success on the merits of the appeal; the usual reasons for deference to the inspector are absent in this case; there is no threat to the health and safety of workers; operational or institutional prejudice may be present for some of the parties, but the prejudice is not significant – Suspension granted

PCL CONSTRUCTORS CANADA INC.; RE LIUNA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 269; ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, AND KEVIN KEALEY, INSPECTOR; File Nos. 0275-09-HS; 0276-09-HS; 0307-09-HS; Dated May 7, 2009; Panel: David A. McKee (5 pages)

Bargaining Unit – *Prima Facie* Motion – Related Employer – CUPE sought a declaration that the three responding parties constitute a single employer under section 1(4) of the Act – A collaboration involving William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc. resulted in WOHC contracting out certain work to CSI – Certain WOHC employees were as a result terminated and re-hired by CSI – The identical collective agreement applied to both the remaining WOHC employees and the transferred employees but the bargaining structure was altered to form two bargaining units – The issue was whether the Board should exercise its discretion to make a related employer declaration in order to preserve a particular bargaining structure – The responding parties moved that the application be dismissed on the grounds that the applicant had not pleaded a *prima facie* case – The Board found that the parties had clearly turned their minds to the management of contracting out in the very circumstances of this case – There was no evidence of mischief, no suggestion the bargaining unit would be subject to further fragmentation and no facts pleaded that would indicate an inability on the union's part to fully engage in the collective bargaining process – The Board will not exercise its discretion to make a related employer declaration merely to preserve a bargaining structure – Application dismissed

WILLIAM OSLER HEALTH CENTRE, THE HEALTHCARE INFRASTRUCTURE COMPANY OF CANADA INC. AND CARILLION SERVICES INC.; RE CUPE, LOCAL 145; File No. 1356-07-R; Dated May 13, 2009; Panel: Kevin Whitaker (10 pages)

Court Proceedings

Bargaining Unit – Certification – Judicial Review – Application by the LIUNA, OPDC (supported by the IUOE) for judicial review of an interim decision by the Board relating to certifications sought for workers of Graham Bros. Construction Ltd. – In its response to both applications for certification, Graham identified 24 individuals on each of its employee lists – The unions determined that 11 of those individuals were properly on the LIUNA list and 13 were properly on the IUOE list – The IUOE then withdrew its application for certification – The unions argued that because Graham was not permitted by s. 128.1(3) of the Act to file a qualified list, they were entitled to take Graham's list as an unqualified position and reach agreement between themselves on the distribution of the 24 employees – Accordingly, when the applicants agreed 13 names belonged on the IUOE list, Graham was a party to that agreement – The Board found that Graham was not a party to the agreement and that in any event the agreement became irrelevant when the application was withdrawn – The Board directed Graham to provide an unqualified list and allowed LIUNA to respond – LIUNA sought judicial review of the Board's decision – The Court held that the Board did not rule on Graham's ability to provide an unqualified list; the finding that Graham was not a party to the agreement between the unions was reasonable – Application dismissed

Board decision to be reported in [2009] OLRB Rep. Mar./Apr. *issue*

GRAHAM BROS. CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND IUOE, LOCAL 793 AND OLRB;

Board File No. 2504-08-R (Court File No. 122/09); Dated May 20, 2009; Panel: J. Wilson, Lederman, Karakatsanis JJ. (4 pages)

Employment Standards – Judicial Review – The Board had upheld an ESO's finding that employees of the applicants' group homes were not covered by an exemption for "residential care workers" and therefore were entitled to overtime pay – On judicial review, the Court found that while the Board recognized the purposes of the ESA, it failed to address the purpose of the exemption, namely to facilitate the operation of the group homes, and failed to balance the purpose of the exemption against the purposes of the Act – The Court found it was unnecessary to address the Board's "consideration of whether the residents in questions were 'developmentally handicapped persons' within the meaning of the regulation," as the Court found the Board's decision was not reasonable due to its failure to address the purpose of the exemption – Application allowed; the Court did not remit the matter back to the Board, but substituted its own decision

Board decision reported at [2008] OLRB Rep. Mar./Apr. 257

LORRAINE FRASER VISCOUNT AND KUIPERS RESIDENTIAL HOMES**;** RE THE DIRECTOR OF EMPLOYMENT STANDARDS, SHIRLEY COYEA AND DANA GRANT AND OLRB; Board File Nos. 0059-06-ES; 0061-06-ES (Court File No. 1719); Dated May 25, 2009; Panel: Valin, J.M. Wilson and Ray, JJ. (6 pages)

Certification – Employer – Judicial Review – Schuit applied for judicial review of two decisions by the Board certifying LIUNA after the employer had failed to respond to the application – In the reconsideration before the Board, Schuit claimed that it did not respond to the application because it was not the employer of the three employees; it had assumed the application was sent to it in error; and it did not appreciate the nature and effect of the application – The Board denied the applicant's request for reconsideration and upheld the original certification – On judicial review, the Court held that the Board was entitled to considerable deference particularly with respect to the exercise of its discretion in the certification process – After considering the employer's reasons for failing to respond to the application, it was reasonable for the Board to exercise its discretion to refuse to reconsider its decision – Application dismissed

Board decision not reported

SCHUIT PLASTERING & STUCCO INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; Board File No. 0210-08-R (Court File No. 537/08) Dated May 15, 2009) Lederman, Karakatsanis and Tulloch, JJ. (6 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
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
L.I.U.N.A., Ontario Provincial District Council v. Graham Bros. Construction Ltd. et al Divisional Court No. 122/09	2505-08-R	Dismissed - May 20/09
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	Pending – 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	Pending – June 11/09
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	Pending – June 9/09
Schuit Plastering & Stucco Inc. et v. Universal Workers Union, L.I.U.N.A. Local 183 Divisional Court No. 537/08	0210-08-R	Dismissed – May 15/09
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	May 20, 2009 – reserved
Lorraine Fraser Viscount Residence v. Kuipers Residential Home et al Divisional Court No. 1719 **LONDON**	0059-06-ES; 0061-06-ES	Granted – May 15/09
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
Universal Workers Union, L.I.U.N.A. Local 183	0910-07-R	Pending

Case name & Court File No.	Board File No.	Status
v. Canadian Construction Workers Union et al Divisional Court No. 201/08		
Ottawa Fertility Centre v. ONA et al Divisional Court No. DV-08-1394 **OTTAWA**	1531-06-PS	April 8/09 - reserved
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. DC-09-00001471-0000 **OTTAWA**	1386-06-R	Pending - June 10/09
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	January 27, 2009 – reserved
Mohamed C.Z. Khan v. Royal Alliance Divisional Court No.461/08	2153-01-OH	Seeking leave to C.A