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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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Vice-Chair Appointment

The Board is pleased to announce the appointment of **Christine Schmidt** as a full-time Vice-Chair. She was educated at McGill University, Dalhousie University and the University of Toronto, called to the Bar in Ontario in 1994 and recently completed the Arbitrator Development Program through the Ministry of Labour. Christine has been a practitioner in the adjudicative process for over 10 years. During that time, she also worked as an independent investigator, and regularly appeared as counsel before professional regulatory bodies and administrative tribunals.

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.

Discharge – Interim Relief – Remedies – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598; Board File Nos. 1507-08-U; 2743-08-M; Dated December 19, 2008; Panel: D. L. Gee (12 pages)

Construction Industry – Conflict of Interest – Practice and Procedure – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided

on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION; Board File No. 0059-08-R; Dated December 22, 2008; Panel: David A. Mckee (18 pages)

Certification – Construction Industry – Evidence – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLLIED TRADES, LOCAL 1891; Board File No. 0593-08-R; Dated December 17, 2008; Panel: Lee Shouldice (9 pages)

Certification – Construction Industry – Practice and Procedure – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

JENSEN BUILDING LTD.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO; UBCJA; Board File No. 1458-08-R; Dated December 3, 2008; Panel: Marilyn Silverman (3 pages)

Bar – Certification – Representation Vote – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40% because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of 40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837; File Nos. 1621-08-R; 1622-08-R; Dated December 2, 2008; Pane: Brian McLean (3 pages)

Court Proceedings

Certification – Construction Industry – Judicial Review – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB; Board File Nos. 3416-06-R; et al. (Court File No. 202/08); Dated December 22, 2008; Panel: Lederman, Ferrier, Swinton (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
Pre-Steve Foods Divisional Court No. 1730/08	1676-08-U	Pending
Complex Services Divisional Court No. 623/08	4028-06-R	Pending
MacKenzie Construction Group Divisional Court No. 532/08	1096-08-R	Pending
Schuit Plastering & Stucco Divisional Court No. 537/08	0210-08-R	Pending
Mohamed C.Z. Khan Divisional Court No. 461/08	2153-01-OH	January 19, 2009
Dr. Peter Khaiter Divisional Court No. 431/08	4045-06-U et al	Pending
Christian Labour Association of Canada Divisional Court No. 382/08	3798-05-R; 3958-05-U	Pending
Lorraine Fraser Divisional Court No. 1719 **LONDON**	0059-06-ES; 0061-06-ES	Pending
Comfort Hospitality Inc. 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
LIUNA v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
LIUNA, Local 183 (Saddlebrook) Divisional Court No. 202/08	3414-06-R et al	Dismissed December 19, 2008
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
IBEW Local 353 v. Jacobs Catalytic Ltd. Divisional Court No. 66/08	2127-05-G; 3437-05-G	January 27, 2009
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 **OTTAWA**	1531-06-PS	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	Dismissed – June 4, 2008 C.A. (Pending)
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