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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 July of this year. Some of these decisions will appear in the July/August issue of the OLRB Reports:

Employment Standards – Evidence – The applicant sought to overturn an order to pay issued against it for termination and severance pay in favour of one employee, arguing first that the employment relationship was on an "elect to work" basis or, in the alternative, that the employee had been guilty of wilful misconduct and therefore was disentitled to the payments – The Board rejected the applicant's first argument, finding that the demands made on the employee to maintain a certain client level precluded the employer from relying on the exemption – The Board found, however, that the employee, a private investigator licensed to work for the employer, was guilty of wilful misconduct – The Board permitted the employer to rely on evidence acquired after the employee was terminated, namely a computer which the employer was only able to recover through litigation – The computer contained files which clearly established the employee was working for a competitor – Application allowed

ACCU-FAX INVESTIGATIONS INC.; RE OLIVER RODD AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2099-02-ES; Dated July 28, 2003; Panel: Jack J. Slaughter (9 pages)

Construction Industry Grievance – The union grieved the employer's refusal to pay a shift differential on overtime hours on the second of a two-shift work schedule – A majority of the Board analyzed the relevant provisions of the collective agreement and found that there was no clear definition of the word "shift" alone which would support the employer's argument that all differential hours should be treated alike – A plain reading of the pertinent sections of the agreement suggests a deliberate use of different terms – Grievance allowed

COMSTOCK CANADA LTD.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30; RE EPSCA; File No. 1894-02-G; Dated July 15, 2003; Panel: Caroline Rowan, A. Haward, G. Pickell (Dissenting) (10 pages)

Bargaining Unit – Employee – Termination – In this application for termination, the responding party union asserted that four individuals on lay-off maintained their employment association with the employer, thus their numbers should be included in the threshold count of "employees in the bargaining unit" – A majority of the Board considered a variety of provisions of the *Labour Relations Act, 1995* which clearly suggest that employees on lay-off retain their status in the bargaining unit – Accordingly, the 40% threshold that would trigger a vote was not met – Application dismissed

DAN HARRIS; RE CHRIS HALL; RE GRAPHIC COMMUNICATION INTERNATIONAL UNION, LOCAL 517-M; File No. 0888-03-R; Dated July 10, 2003; Panel: Patrick Kelly, R.R. Montague, J.A. Ronson (Dissenting) (5 pages)

Occupational Health and Safety – The employer appealed and sought the suspension of orders requiring it to establish and operate a joint health and safety committee at a single school within the School Board – The applicant submitted it had a strong *prima facie* case for success on the merits

of the appeal, the health and safety of its employees would not be jeopardized if the orders were suspended (the school was closed for the summer in any event) and it would be severely prejudiced if it were forced to create and appropriately train and equip such a committee pending the outcome of the appeal – Of all the responding parties, only the Ministry of Labour filed submissions in response to the suspension request and it took no position on the employer's request – The Board was satisfied that the employer had met the criteria for a successful suspension request, and went on to consider the provisions of s. 9 of the Act (including the Board's jurisdiction) as well as O. Reg. 857 which appears to allow a School Board-wide joint health and safety committee – Suspension request granted

GREATER ESSEX DISTRICT SCHOOL BOARD; RE SHARON CIEBIN; DREW DAVIDSON; ET AL; OSSTF, D-9; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; CUPE, LOCAL 1348; BAC, LOCAL 6; UBCJA, LOCAL 494; CUPE, LOCAL 27; IBEW, LOCAL 773; LIUNA, LOCAL 625; PAT, LOCAL 1494; UA, LOCAL 552; TERRY WARAICH, INSPECTOR; AND MINISTRY OF LABOUR; File No. 1125-03-HS; Dated July 25, 2003; Panel: Harry Freedman (4 pages)

Constitutional Law – Discharge – Unfair Labour Practice – The applicant complained about the dismissal of an agricultural employee for expressing support for a trade union – The employer and the Attorney General of Ontario relied on the Supreme Court of Canada's decision in *Dunmore v. Ontario (Attorney General)* which struck down the repeal of protection for agricultural workers in the *Labour Relations Act, 1995* but gave the government eighteen months to enact new legislation addressing freedom of association for farm workers – The employer and the Attorney General argued that the issue had already been determined by the Supreme Court, therefore *res judicata* applied or, alternatively, that finality should trump the union's claim that justice requires a re-litigation of the issue of farm workers' rights – The Board accepted the Attorney General's argument that the eighteen-month suspension of the order in *Dunmore* preserved the force and effect of the impugned provision such that the trade union and the discharged employee were not entitled to any relief – Application dismissed

HIGHLINE PRODUCE LIMITED C.O.B. AS WELLINGTON MUSHROOM FARM; RE UFCW CANADA; File No. 3879-02-U; Dated July 21, 2003; Panel: Christopher J. Albertyn (4 pages)

Employment Standards – The applicant employee sought payment of wages for work performed in the context of his superintendent duties at a housing complex – The employer argued that the tasks were distinct from the employee's duties and that he was performing maintenance and disposal as a sub-contractor, not an employee – The Board found that although the work had been contracted for apart from the employee's normal duties, there was no tendering process and the work was not "awarded" to the applicant, therefore he remained an employee at all times – Application allowed

LYNWILL REAL ESTATE CORPORATION AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ALAIN BEAUDET; File No. 3639-02-ES; Dated July 9, 2003; Panel: Marilyn Silverman (4 pages)

Employment Standards – Discharge – The applicant employee sought termination and severance pay for his unlawful dismissal – An Employment Standards Officer investigated the claim and found the employee was owed in excess of $37,000 – In light of the maximum amount an Officer can order under the Act, the ESO arranged for a voluntary payment of $10,000 from the employer, and no order to pay was issued – The employee appealed – The Board found that the arrangement effected by the Officer was not one contemplated by s. 103(1)(a) of the Act – The employer was ordered to pay $10,000 – Application allowed in part

NORTH YORK CHEVROLET OLDSMOBILE LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE WILLIAM N. BROWN; File No. 2235-02-ES; Dated July 11, 2003; Panel: Patrick Kelly (8 pages)

***Canadian Charter of Rights and Freedoms – Hospital Labour Disputes Arbitration Act* – Strike – Unfair Labour Practice** – In this application by the OHA the Board found that OPSEU's call to its members to support the planned "Emergency Day of Action" was actually an unlawful strike contrary to s. 11 of *HLDAA* – The Board ordered OPSEU to cease and desist from calling, authorizing, encouraging, supporting or threatening an unlawful strike, and recited a list of possible remedies that the employer could seek

should the action take place – In reasons issued subsequently, the Board held that the strike and related picketing constituted expressive activity protected by s. 2(b) of the Charter, but s. 11 of *HLDAA* was a reasonable limit on the freedom of expression justifiable under s. 1 of the Charter – The Board echoed its reasoning in *General Motors* [1996] OLRB Rep. May/June 409 that "political strikes" are protected expressive activity when they are designed to influence social and political policy – The "political" nature of the strike is secondary to the presence or absence of "expressive" behaviour – Nonetheless a provision such as s. 11 of *HLDAA* is within the realm of reasonableness in that it is not disproportionate to the overall goal of containing industrial conflict

ONTARIO HOSPITAL ASSOCIATION; RE OPSEU; RE ATTORNEY GENERAL OF ONTARIO; File No. 3631-02-U; Dated July 8, 2003; Panel: Kevin Whitaker, R. O'Connor, R. Montague (31 pages)

Certification – Representation Vote – The Carpenters filed a certification application shortly after the Labourers, for the same bargaining unit and the same employees – The Board (differently constituted) refused to consider both applications as having been filed on the same day – A second panel of the Board directed that the Carpenters' application be held in abeyance until there was a final determination in the Labourers' application – When the Labourers lost the representation vote, this panel of the Board determined that the consequence of the dismissal of that application under section 10(2) of the Act triggered the operation of section 10(3) – Application dismissed

PROMARK ALUMINUM LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UBCJA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1060-03-R; Dated July 23, 2003; Panel: Harry Freedman, John Tomlinson, George McMenemy (3 pages)

Employment Standards – Timeliness – The applicant, a small law firm, sought an extension of time for filing its application for review, citing "numerous court directed and statutory limitation periods, which we must adhere to strictly, or risk great prejudice to our clients" – The Board found the applicant's circumstances for the late filing less than compelling and, given the length of the delay (60 days), the remedial nature of the legislation and the prejudice to the employee, refused to grant the extension – Application dismissed

SOKOLOFF & ASSOCIATES; RE LELIETH BARNES AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0965-03-ES; Dated July 11, 2003; Panel: Jack J. Slaughter (2 pages)

Bargaining Unit – Certification – The union applied for a tag-end unit of employees at one of the responding party's two locations – The employer proposed a unit of all employees at both locations not already covered by a subsisting collective agreement – The employer argued that it was undertaking a consolidation of its existing production bargaining units and the union's proposed single-location unit would create significant labour relations problems disruptive to its employment and business relationships – The Board held that the employer's proposed unit was the appropriate one – When the larger unit votes were counted, the application was unsuccessful – Application dismissed

TIERCON INDUSTRIES INC.; RE TEAMSTERS LOCAL UNION NO. 879; RE UNION OF NEEDLETRADES INDUSTRIAL AND TECHNICAL EMPLOYEES, UNITE ONTARIO COUNCIL; File No. 3279-02-R; Dated July 16, 2003; Panel: Christopher J. Albertyn, Richard O'Connor, H. Peacock (10 pages)

Trusteeship – Trade Union – Unfair Labour Practice – The applicant alleged that the responding party violated several sections of the Act when it placed the applicant in trusteeship and removed its president – The responding party sought to have the application dismissed on a *prima facie* basis because no sections of the Act had been violated or, alternatively, because the Board has no jurisdiction to review the trusteeship until it has been in place for twelve months – The Board held that it does have the jurisdiction to inquire into alleged unfair labour practices – On consent of the parties, the matter was adjourned *sine die*

TORONTO OCCASIONAL TEACHERS' BARGAINING UNIT (O.T.B.U.), DISTRICT 12, OSSTF; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION (O.S.S.T.F.); File No. 0666-03-U; Dated July 15, 2003; Panel: Mary Anne McKellar (3 pages)

Employment Standards – Intervenor – Parties – In this referral from an arbitrator of a related employer question pursuant to section 101 of the *Employment Standards Act, 2000*, a number of branches of the Victorian Order of Nurses sought intervenor status to be able to provide the Board with some insight into the operations of the VON and their contractual relationship with Community Care Access Centres – The Board relied on the traditional test of "direct and legal interest" as opposed to commercial interest and found that the branches' interest was more commercial than direct or legal – In any event, a determination of the relatedness of the parties in this arbitration would not bind the other branches – Intervenor status denied

VICTORIAN ORDER OF NURSES WATERLOO-WELLINGTON-DUFFERIN BRANCH AND VICTORIAN ORDER OF NURSES CANADA AND COMMUNITY CARE ACCESS CENTRE FOR WELLINGTON-DUFFERIN AND COMMUNITY CARE ACCESS CENTRE OF WATERLOO REGION AND KPMG INC.; RE OPSEU, LOCAL 253; File No. 4206-02-ES; Dated July 29, 2003; Panel: Brian McLean (3 pages)

Evidence – Practice and Procedure – Unfair Labour Practice – The parties asked the Board for a ruling on the admissibility of taped conversations between the employer and one individual who was discharged and two others who were not hired because of their alleged support of the union – The Board canvassed arbitral jurisprudence which was averse to the admissibility of evidence that might destroy a long-term employment relationship – In the circumstances of this case, the Board held that the importance of finding facts to substantiate the unfair labour practice allegations outweighed the social or legal policy considerations which would favour inadmissibility – Tape recordings admitted into evidence

WYLIE ELECTRIC, RICHARD WYLIE, 1425786 ONTARIO INC. C.O.B. AS; RE IBEW, LOCAL 115; File No. 1779-02-U, Dated July 3, 2003; Panel: David A. McKee (4 pages)

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Some of 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 Library, now located on the 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court File No. 410/03	2087-01-U	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Pending
Teamsters, Chemical, Energy and Allied Workers, Local Union 1880 v. Dominion Colour Corp. Divisional Court File No. 391/03	0425-02-U	Pending
CAW-Canada v. National Grocers Co. Ltd. and UFCW, Locals 1000A, and 175/633 Divisional Court File No. 382/03	0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U	Pending
Greater Essex County District School Board Divisional Court File No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court File No. 277/03	3426-00-R	Pending
OPSEU v. Ontario Hospital Association Divisional Court File No. 83/03	3631-02-U	Pending
Canadian Health Care Workers v. CAW-Canada, Central Park Lodges et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Pending
CAW-Canada & its Local 385 v. Coca-Cola et al Divisional Court No. 751/02	0179-01-R; et al	Pending
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Pending
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. Ottawa Transition Board, et al Divisional Court No. 02-DV-723	2353-00-PS	Pending – Nov. 27/03
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Pending – Nov. 18/03
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Heard Dec. 12/02; reserved
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3256-99-ES	Pending
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Adjourned